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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 152

FRANK CANIZIO, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

ON WRIT OF CERTIORARI TO THE COUNTY COURT, KINGS COUNTY, STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 22, 1945.

CERTIORARI GRANTED OCTOBER 8, 1945.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 12, 1945.

[fol. 1]

IN COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK

Present: Hon. Nathan R. Sobel, County Judge.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

FRANK CANIZIO, Defendant

ORDER DENYING MOTION TO SET ASIDE JUDGMENT—April 13, 1945

The above named defendant having moved this court for an order vacating and setting aside a judgment of conviction dated June 19, 1931, and the said motion having been duly submitted,

Now, on reading and filing the notice of motion dated December 27, 1944, and the affidavit of Frank Canizio verified December 27, 1944, in support of said motion, and the affidavit of William I. Siegel, verified March 23, 1945, in opposition thereto, and upon all other papers and proceed-
[fol. 2] ings heretofore had herein, and due deliberation having been had, and the court having rendered its decision on the 5th day of April, 1945, it is, on motion of William O'Dwyer, District Attorney of Kings County,

Ordered, that the said motion be and the same hereby is in all respects denied.

Enter. (Signed) Nathan R. Sobel, County Judge.

Granted April 13th, 1945. Francis J. Sinnott, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 3] IN COUNTY COURT OF KINGS COUNTY

[Title omitted]

AFFIDAVIT OF DISTRICT ATTORNEY—Filed April 4, 1945

STATE OF NEW YORK,
County of Kings, ss:

William I. Siegel, being duly sworn, deposes and says:

I am an assistant district attorney on the staff of the district attorney of Kings County, and make this affidavit, on information and belief, in opposition to a motion made by the defendant for an order vacating and setting aside a judgment of conviction entered against the defendant on his own plea of guilty. The sources of my information and the grounds of my belief are the records and files of the offices of the district attorney and the clerk of the County Court of Kings County.

On May 25, 1931, the defendant together with Patsy Guariglia and Tony Bruno, was indicted for Robbery in the first degree; Grand Larceny in the second degree, and Assault in the second degree, it being alleged that they together took by force and fear a taxicab from one Joseph Grosshandler, Bruno being at the time armed with a revolver.

[fol. 4] The defendants were arraigned on the same day before County Judge Algeron I. Nova, and pleaded not guilty. On June 1, 1931, the defendants personally appeared before Judge Nova and withdrew their pleas of not guilty and pleaded guilty to Robbery in the first degree, unarmed. On June 19, 1931, the defendant was sentenced to a term of fifteen to thirty years.

The defendant in his motion papers now states that at the time of the arraignment and plea he was nineteen years old and unfamiliar with legal proceedings. He further states that when arraigned and when he pleaded guilty he was without counsel and was not advised by the court of his right to counsel, and was not asked by the court whether he desired that counsel should be assigned. He makes the same allegations with respect to the day of sentence.

I have inspected the records of the County Court and find the following to be the facts:

The clerk's minutes (vol. 323 at p. 89) do not show the name of any counsel appearing for the defendant at the time

he was arraigned and pleaded not guilty. Judge Nova's daily calendar for that day is not available. The reverse side of the indictment on which the notation of the plea of not guilty is entered has a printed line reading as follows: "Counsel assigned yes no". The words "yes" and "no" are both stricken out.

[fol. 5] No notice of appearance was filed on behalf of the defendant until June 17, 1931, when an attorney named John J. Olivia of 53-63 Park Row, New York City, filed a notice of appearance.

The records shows that on June 1, 1931, when the defendant withdrew his plea of not guilty and pleaded as heretofore stated, that assistant district attorney Sullivan appeared. The records make no mention of any counsel appearing for the defendant. The typewritten transcript of the minutes of the proceedings on June 19, 1931, when the defendant was sentenced, shows that counsel for all of the defendants appeared.

I have spoken to Mr. Rudolph Gross who appears to have been the clerk in the part on June 1, 1931, when the plea of guilty was taken, and Mr. Gross states that to the best of his recollection it was not his procedure when a case appeared on the trial calendar for trial, but where the defendant withdrew a previous plea of not guilty and wished to plead guilty, to advise the defendant of his right to counsel. However, this does not foreclose the possibility that the trial court itself thus advised the defendant or that he had been so advised at the time of arraignment.

In sum, from the records it cannot be stated affirmatively that the defendant was advised of his right to counsel at the time of the arraignment and plea, but it also cannot be stated affirmatively that he was not thus advised. It is sub-
[fol. 6] mitted, however, that a presumption exists that both the court and the clerk performed their official duties and that the Court directly or through the clerk informed and advised the defendant of his right to counsel.

This defendant has delayed for a period of fourteen years in making the application attacking the jurisdiction of the court. It is possible that during that time records which formerly existed have disappeared, and it is certainly true that witnesses who might have disproven the defendant's present assertions have over the years lost any independent recollection of the actual occurrences. In the absence of convincing affirmative proof (the burden to submit which

is on the defendant) of the failure of the court to perform his official duty properly, the presumption of regularity should prevail.

Wherefore, your deponent respectfully prays that the motion be denied.

William I. Siegel.

Sworn to before me this 23rd day of March, 1945.
Frank Di Lalla, Notary Public, Kings Co.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 7] IN COUNTY COURT OF KINGS COUNTY

[Title omitted]

AFFIDAVIT OF SERVICE—Filed February 8, 1945

COUNTY OF CAYUGA,
State of New York, ss:

To: The County Court, Kings County:

On this 27 day of December, 1944, I have placed in the United States mail box at the post office in Auburn State Prison a copy of all the papers here appended. Such being properly sealed and addressed to the District Attorney, District Attorney's Office, Brooklyn, N. Y.

(Signed) Frank Canizio, 135 State Street, Auburn, New York.

Sworn to before me this 27 day of December, 1944.
(Signed) Henry F. Schmitz, Notary Public, Cayuga County.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 8] In County Court of Kings County

[Title omitted]

Notice of Motion—Filed February 8, 1945

Sirs:

Please Take Notice, that upon the annexed verified petition of Frank Canizio, duly verified this 27 day of December, 1944, the pleadings, papers and all the proceedings heretofore and herein, the undersigned will move this Court at a stated term thereof, to be held at the County Courthouse in Brooklyn, on the 15 day of January, 1945, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order vacating and expunging from the records a void judgment that was rendered on or about June 19, 1931, and for such other relief as the Court may deem just and proper on the premise.

Yours, etc., Frank Canizio, 135 State Street, Auburn, New York.

To: Thos. C. Hughes, Esq., Asst. District Attorney, Kings County, Brooklyn, N. Y.

To: Mr. John Lantry, Clerk, Kings County Court, Brooklyn, N. Y.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 9] In County Court of Kings County

[Title omitted]

Petition to Vacate and Expunge from the Record a Void Judgment. The County Court of Kings County Having Denied Petitioner His Constitutional Right to the Assistance of Counsel Was Without Jurisdiction to Render Such Judgment—Filed February 8, 1945

County of Cayuga,
State of New York, ss:

To: Honorable Nathan A. Sobel, County Judge:

The petitioner, Frank Canizio, having been duly sworn according to law, deposes and says:

That he is the petitioner in the above entitled action, that he is a poor person with no funds to employ learned coun-

sel, so he therefore appears in person in this proceeding. He prays, nevertheless, that this Honorable Court protect his constitutional and statutory rights, whenever and wherever necessary in this proceeding.

He respectfully petitions this Court to vacate and expunge from the records a judgment rendered against him on or about the 19th day of June, 1931, sentencing him for an indeterminate term in State Prison, the minimum of which was fifteen (15) years and the maximum of which was thirty (30) years, for the reason that the County Court of Kings County did not have jurisdiction in rendering such [fol. 10] judgment having denied your petitioner his constitutional right to the assistance of counsel, and failed to comply with the mandate of the Code of Criminal Procedure, whereby the Court, at all stages of criminal proceedings, when a defendant appears for arraignment without counsel, must inform him of his rights to the assistance of counsel, ask him if he desires counsel, and if so, the Court must assign counsel. Or should the defendant waive any constitutional rights such "waiver" should be appropriately noted on the record and made an integral part of the proceedings.

THE FACTS

On May 25, 1931, the petitioner, with two others, was indicted by the Grand Jury of Kings County for the crime of Robbery in the first degree, inasmuch as it was alleged he stole and took from the possession of Joseph Grosshandler, a taxicab of the value of five hundred dollars. The petitioner being at the time only 19 years of age and never before convicted of a crime. He resided at the time at 1178 72nd Street, Brooklyn, New York. His parents were both dead. He had no substantial education. In fact he had no education at all.

On this same date, May 25, 1931, he was arraigned in the Kings County Court to plead to the indictment (No. 3465b). He was without counsel. He did, however, enter a plea of not guilty to the indictment. He was ignorant of his constitutional rights to counsel, and being a poor boy without parents or money, he believed he could not be represented [fol. 11] by counsel, having no money to pay counsel. The Court on this occasion did not inform him of anything to the contrary. It did not, when he appeared without counsel, ask him if he desired counsel or informed him if he so de-

sired that the Court would assign counsel. It cannot be said that he waived his right to counsel as such a waiver would be the intentional relinquishment or abandonment of a known right, but since this 19-year-old boy did not know, and was not advised of his rights to counsel, a waiver would be impossible. (Bennecke v. Conn. Mut. Life Ins. Co. 105 U. S. 455; Johnson v. Zerbst, 304 U. S. 458; People v. Bradner 107 N .Y. 1; People v. Miles, 289 N. Y. 360).

On June 1, 1931, the defendant again appeared personally and without counsel and withdrew his plea of not guilty theretofore entered and plead guilty to the crime of robbery in the first degree. The Court again failed to inform him of his right to counsel and he did not waive his right as he was ignorant of such constitutional prerogative. The proceedings were had before Nova, J., in Part 3 of the Kings County Court. The petitioner was immediately remanded for sentence.

On June 19, 1931, the petitioner was again arraigned in the Kings County Court, this time for sentence. He again appeared without counsel, he was not informed in any manner of such constitutional right to counsel and neither did he waive such right as he was totally ignorant of its existence, and the Court failed in its duty, mandatorily prescribed by the statute, to inform him of his right to the assistance of [fol. 12] counsel, but instead inflicted the maximum punishment prescribed for the crime of robbery in the first degree, namely, fifteen to thirty years in State Prison. All the records of the Kings County Court having bearing on the case of petitioner in this instance concur in the foregoing representations.

JURISDICTION

It is well settled that this Court has the authority to vacate and expunge a judgment, where the Court had no authority to render it in the first instance proceeding the denial of the petitioner his constitutional right to the assistance of counsel for his defense, where in such denial the Court lost jurisdiction, and that such power to so vacate and expunge void orders and judgments inheres in the very constitution of the Court. See Robinson v. Johnson, 118 F. (2) 998; Matter of Morhaus, 293 N. Y. 131; Picketts Heirs v. Legerwood 7 Pet. 144; Ex Parte Hawk. 64 S. Ct. 448; Ex Parte Abernathy 64 S. Ct. 13; For Illinois cases by Mandamus see People ex rel.

Carlstrom, Atty. Gen. V. Shurtleff, Judge 189 N. E. 291; People ex rel. Swanson v. Kelly 352 Ill. 567, 186 N. E. 188. Point First in petitioner's brief is dedicated to this proposition lest this Court might have some doubt as to its inherent authority to grant the relief herein prayed for.

Questions Presented

(1). Whether the provisions of the New York State Constitution*al*, Article 1, Section 6, guaranteeing the assistance of counsel in all criminal trials at all stages of the proceed-
[fol. 13] ings have been complied with.

(2). Whether the Kings County Court, Nova, J., complied with the statutory mandate of Section 308 of the Code of Criminal Procedure, whereby that when a defendant appears on arraignment without counsel, the Court *must* ask such defendant if he desires counsel, and if he does, the Court *must* assign counsel.

(3). Whether the petitioner, in view of the negative reply that must be given to questions 1 and 2 was deprived of his liberty without due process of law in violation of the 14th Amendment of the United States Constitution.

Reasons Relied on for Granting This Petition

The petitioner was denied, on each and every arraignment in the Kings County Court on May 25, 1931, June 1, 1931, and June 19, 1931, the right to the assistance of counsel as provided by the Constitution of this State, and the County Court of Kings County, in failing to obey and comply with the Constitutional and statutory mandates expressly enacted to protect this constitutional right, was without jurisdiction to render the judgment against the petitioner or to accept his plea of guilty to robbery in the first degree, and all the proceedings had subsequent to the denial of this constitutional right were void, and the petitioner was deprived of his liberty without due process of law (Code of Criminal
[fol. 14] Procedure, Section 308; New York State Constitution, Article 1, Section 6; United States Constitutional Amendment 14).

Wherefore, your petitioner prays that this Court cause to be issued, an order vacating and expunging from the records the void judgment rendered against your petitioner whereby he was sentenced to fifteen to thirty years in State

Prison on or about June 19, 1931, and that your petitioner have such other and further relief as the Court may deem just and proper on the premise.

Dated at Auburn, New York, December 27, 1944.

(Signed) Frank Canizio, Petitioner in Person, 135 State Street, Auburn, New York.

Duly sworn to by Frank Canizio. Jurat omitted in printing.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 15] In County Court of the County of Kings

Part III

Before Hon. Algernon I. Nova, County Judge

The People of the State of New York, Plaintiffs,

against

Frank Canizio, Patsy Guariglia, and Tony Bruno, Defendants

Stenographic Minutes of Arraignment

Brooklyn, N. Y., June 1, 1931.

Appearances:

Harry Sullivan, Esq., Assistant District Attorney, for the People.

The Court: This is indictment No. 3465-b, against Frank Canizio, Patsy Guariglia, and Tony Bruno. They are indicted for robbery in the first degree, grand larceny in the second degree, and assault in the second degree in that on May 22nd, 1931, they robbed one Joseph Grosshandler of a taxicab valued at $500., armed with a gun. Canizio, how old are you?

Canizio: Nineteen, Your Honor.

The Court: Guariglia, how old are you?

Guariglia: Sixteen.

The Court: Bruno, how old are you?

Bruno: Seventeen.

The Court: Bruno is now out on a suspended sentence of petit larceny from this court; Canizio in 1928 served a [fol. 16] House of Refuge juvenile delinquency sentence. Guariglia, have you ever been in any reformatory?

Guariglia: No, sir.

The Court: No record?

Guariglia: No, sir.

The Court: The story connected with these three defendants is as follows: that on the day in question they hailed a taxicab in New York, the taxicab driven by Joseph Grosshandler, and in the night time thereof they travelled to Brooklyn. When they got over into Brooklyn, then at the point of a gun they ordered this taxicab driver from his seat and they took the taxicab away from him. However, before that was done, these defendants admitted that they directed the taxicab driver to stop twice at least, whereat, upon each occasion thereof these three defendants, or the two of them and two others not here, went out and held up two other men; and the result of the robberies was about the sum of fifty cents, as I am told. That was the taxicab. The next night they went out and they stole a Buick automobile, and that charge is contained in indictment no. 3465-d; but, however, in view of the plea they are taking to the robbery indictment by and with the consent of the district attorney, we are going to dismiss as against these three defendants the larceny charge of the automobile. Oh, the other two defendants——

Mr. Sullivan: I don't think Bruno was on the larceny. [fol. 17] The Court: If Bruno is not on the larceny, that does not apply. It seems, however, that when they stole this Buick automobile it was then, or about that time that Detective Francis Gratano, who knew Tremarco from another case of a similar nature, which Tremarco beat, and having recognized Tremarco in the Buick automobile, he trailed them. They were about to do a job, but the detectives, to their everlasting credit, anticipated these defendants before they got that far, and with the use of the police detective department machine crowded these defendants over to the curb and ordered them out, and at or about that time there were sounds of something heavy dropping to the floor of the automobile. There were four revolvers: one magazine gun, two .32's, and one .45 all fully loaded. The .45 gun did not have .45 bullets in it, it had .38's but these defendants knew enough about guns to be able to pack the .38 bullets with

wadding, so as to make them fit into the barrel of the .45 gun. It would not interfere with the shooting to kill. The .32 bullets, Canizio admitted that he sliced the points of the bullets, and in the language of one understanding that knows that that permits the lead to spread out when the bullet is fired and when it reaches the object it hits causing more certainty of death or injury and prevents the bullets in spreading the object that it hits from being identified later on.

Now, Mr. District Attorney, do you consent to take that plea of robbery in the first degree from Canizio, Guariglia, [fol. 18] and Bruno, and to dismiss all other indictments against these three defendants—the plea of robbery in the first degree unarmed?

Mr. Sullivan: As I understand it, the only other indictment is this grand larceny indictment as to Canizio and Guariglia.

The Court: All right, in other words my sentence under the law of robbery in the first degree would be mandatory.

Mr. Sullivan: Yes.

The Court: I would have to give these defendants at least fifteen years up in Sing Sing.

Mr. Sullivan: No objection to the dismissal of the grand larceny indictment.

The Court: All right, you consent to the other plea?

Mr. Sullivan: Yes.

The Court: Take the plea, Mr. Clerk, as against these three defendants.

(Plea taken.)

[fol. 19] I Hereby Certify that the foregoing is a true and accurate transcript of all the proceedings had on June 1, 1931, in the case of The People of the State of New York vs. Frank Canizio, et al.

Ralph E. Roberts, Official Stenographer.

[fol. 20] IN COUNTY COURT OF KINGS COUNTY

[Title omitted]

Brief in Support of Petition to Vacate and Expunge from the Records of the Kings County Court a Void Judgment

JURISDICTION

The facts with regard to jurisdiction are set forth in the foregoing petition and the inherent authority of the Court over its own judgments in Point First in this brief.

STATEMENT OF THE CASE

The basic facts have been set forth in the foregoing verified petition. However, there are other facts and authorities discussed in this brief in connection with the argument to sustain petitioner's cause.

[fol. 21] POINT FIRST

The Power of the County Court of Kings County to Set Aside, Vacate and Expunge From the Record Its Own Judgments, When it Has Been Established in a Proceeding on the Merits That Such Judgments Were Rendered in Violation of Constitutional Rights Is Not Controlled by Statute. This Power Is Based upon the Inherent Right and Duty of the Court to Protect the Citizen in His Constitutional Prerogatives

It has been now well established by the highest court in this State and in the nation, that a Court of competent jurisdiction may, at any time, on a direct application vacate and expunge a void order or a void judgment; in fact, it would logically seem to be the more appropriate procedure, as such a Court has a more immediate access to the records and undoubtedly would be better acquainted in many ways with the facts pleaded. Such a power is not controlled by statute but inheres in the very constitution of the Court itself. It is a function, by its very nature, judicial. Statutes cannot be construed in such a manner to destroy this inherent power or whereby they might be repugnant to the due process clauses of the national and state constitutions, or in such a manner that the constitutions should be a subordinate authority, and although the organic laws contain no descrip-

tion of those processes which it was intended to allow or prohibit, it was not left to legislative authority to enact any processes which might be devised. Den. Ex Dem. Murray v. Hoboken Land etc. 18 How. 272, 15 L. Ed. 372. The power of this Court to set aside, vacate or expunge void judgments, in the furtherance of the ends of justice, is unques-
[fol. 22] tionable. It is a power exercised continually, and grows out of the control it has over its own records and judgments, and when facts exist showing that the ends of justice may require its exercise, the Court should have no hesitation in doing so. This power is continually exercised in civil cases and as was stated by the Court in Lyons v. Goldstein, 290 N. Y. 19, as to the exercise of this power in criminal as well as civil cases that:

> "No logical distinction can be made between such power over judgments in civil cases and such power over judgments in criminal cases. There is nothing unique about a judgment or its execution in criminal cases which excepts it from the rules applicable to judgments generally and the inherent powers of the Courts with reference to them. The power was exercised in criminal cases at common law through the writ of error *coram vobis*. Robinson v. Johnson, 9 Cir., 118 F. (2) 998; United States v. Mayer, 235 U. S. 55."

In the Robinson v. Johnson, 118 F. (2) 998, cited in Lyons v. Goldstein, supra, the Court said:

> "It would seem reasonable that the Court rendering the void judgment could set it aside at any time on direct application for such an order, as well as on a collateral attack by petition for a writ of habeas corpus. Such an application by motion to the trial court is in the nature of an application for a writ of error *coram vobis*. The common law remedy by such writ has been superseded in the federal courts by motion addressed to the Court where judgment is attacked."

For a comprehensive discussion of this procedure by a modern case authority, see Orfield, "The Writ of Error Coram Vobis in Civil Practice (1934) 20 Va. L. Rev. 423; [fol. 23] Abraham L. Freedman in Vol. 3 Temple Law quarterly at pp. 366-371; United States v. Plumer 27 Fed. Cas.

573; Picketts' Heirs v. Legerwood 7 Pet. 144; Moone's Federal Practice, Vol. 3, p. 3257; United States v. Lynch, 132 F. (2) 111.

Compare also Hamilton v. Holcomb, 1 John. Cas. (N. Y.) 29 (1799); Ladd v. Stevenson, 112 N. Y. 325; Vanderbilt v. Schreyer, 81 N. Y. 646; Waley v. Johnson, 316 U. S. 101; Matter of Morhaus, 392 N. Y. 131; U. S. v. Steese, 144 F. (2), decided U. S. C. C. A., 3 Cir. Aug. 25, 1944.

From these existing authorities on the subject, and those which stem from them, it is clear that this Court has abundant authority to hear this case on its merits and grant the relief prayed for.

Point Second

The Right upon Arraignment, and at All Stages of the Proceedings, to the Advise of Counsel Is Jurisdictional, and the Court Had No Authority to Proceed Until It Had Asked the Defendant If He Desired Counsel, and Any Proceedings Thereafter Were Void and in Derogation of the Defendants' Constitutional Rights.

It is well settled, by judicial rulings and legislative mandate, that where an accused appears alone on his arraignment without counsel, he must be asked if he desires counsel. It is not the function of the accused to see that this privilege is accorded him, as it is not presumed he knows he is entitled to benefit of counsel, but the legislature has seen fit to enact an express statute placing such a duty on the judicial officer before whom he is arraigned to so advise him. (Code of Criminal Procedure, Sections 8, 188, 308). This benefit of counsel to one accused of a crime is [fol. 24] a constitutional guarantee, no distinction is made between the arraignment and any other stage of the criminal proceedings. The duty upon a Court of according the accused such right is positive and affirmative and cannot be ignored. To reassure an accused this constitutional prerogative, the New York State Legislature has made positive provisions for its protection by enactment of Section 308 of the Code of Criminal Procedure which reads in part as follows:

> "If the defendant appear for arraignment without counsel, he must be asked if he desires counsel, and if he does the Court must assign counsel."

It should here be noted that the mandatorily word "must" appears not less than twice in this particular part of the statute: "He *must* be asked," and "the Court *must* assign counsel." The intention of the Legislature in the enactment of this statute expressly placing upon the Court this duty is extremely clear. It would be quite a hardship on an ignorant, nineteen-year-old boy, unlearned in the niceties of the law to excuse the failure of advising such an unfortunate young man of his right on the ground that every person is presumed to know the law. It might be presumed he should know right from wrong, generally, but never has any presumption existed that he should know the duties mandatorily placed on a trial judge by the constitution and statutes. Such a presumption is not even attached to a formal indictment—hastily read in part to an accused on his arraignment. These safeguards by constitutional provisions and statutory enactments are not idle [fol. 25] gestures by the people and their representatives, they are placed about a defendant to be accorded him by prosecuting officers and courts, and he cannot be deprived of these rights with impunity. The same principle applies whether the accused be an individual educated in the law (Glasser v. United States, 62 S. Ct. 457) or an ignorant, 19-year-old boy as in the case at bar. The Court cannot demand of the petitioner at that age the degree of perfection which Kipling, in his "If," set forth as some of the necessary attributes of a man, when he said:

"If you can keep your head when all about you
Are losing theirs and blaming it on you;
If you can trust yourself when all men doubt you,
But make allowance for their doubting too;

* * * * * * *

If you can bear to hear the truth you've spoken
Twisted * * * To make a trap for fools

* * * * * * * *

If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you,

* * * * * * * * *

* * * You'll be a man, my son!"

The Courts of this nation have never demanded such a degree of perfection from any human being. Nor can it be likewise demanded of a defendant because he had been previously in a courtroom charged with some offense or [fol. 26] delinquency that it should be presumed he did in fact know of his right to counsel. This is the very presumption that cannot be indulged. People ex rel. Moore v. Hunt, 258 App. Div. 24; People v. McLaughlin, 291 N. Y. 480.

Point Third

The Fact That Petitioner Was Ignorant of His Right to Counsel, Coupled With the Failure of the Court to Inform Him of Such Right, Precludes Any Presumption That Petitioner Waived His Right to Counsel.

It has been well established by the logical and reasonable decisions of the higher courts, that a "waiver" constitutes the relinquishment or the abandonment of a known right or privilege, so it must be conceded that, as at no time was petitioner informed, nor did he know or believe that he was entitled to the assistance of counsel, and at no time did anyone ask him if he desired the assistance of counsel nor did anyone offer to procure such assistance for him; and because he was without money to pay for counsel and believed he could not obtain the assistance of counsel without money to pay a lawyer, that petitioner did not waive his right to counsel. In fact the "Courts indulge every reasonable presumption against waiver" and "do not presume acquiescence in loss of a fundamental right." (Johnson v. Zerbst, 304 U. S. 458). Nor can a presumption be sustained that a defendant knows of his constitutional right to the assistance of counsel, on this problem the court in Evans v. Rives, 126 F. (2) 633, stated:

> [fol. 27] "There is no more basis for such a presumption than for one that a defendant understands the rules governing the sufficiency of indictments, the admissability of evidence, and the burden of proof, or other rules of substantive and adjective law, and the existence of such a presumption is negatived by the statement of the Supreme Court in Johnson v. Zerbst • • • that "The purpose of the constitutional guaranty of right to counsel is to protect an accused from

conviction resulting from his own ignorance of his legal and constitutional rights.' "

When such a constitutional provision is designed solely for the protection of a citizen, it is competent for him to waive the protection and to consent to such action as would be invalid if taken against his will, by such a waiver the citizen relinquishes or refuses to accept only right belonging to him and him alone, but as such waiver must be defined as the intentional relinquishment of a known right with both knowledge of its existence, and the competent and intelligent intention to relinquish it, in the case of the petitioner who was totally ignorant of its existence he could execute no such waiver. Johnson v. Zerbst, supra; Bennecke v. Conn. Mut. Life Ins. Co. 105 U. S. 355; Cooley's Constitutional Limitations, 219; A plea of guilty constitutes no such waiver. Walker v. Johnson, 312 U. S. 275; People ex rel. Moore v. Hunt, supra.

[fol. 28] POINT FOURTH

Not Only Must This Primary Right Be Protected But There Must Be Made a Record of All Proceedings That Have a Bearing Thereon, So That Intelligent Review May Be Had. People v. McLaughlin, 291 N. Y. 480. Where a Waiver Exists it Is Fitting and Appropriate That it Appear on the Record. Johnson v. Zerbst, 304 U. S. 458

In the case of petitioner there can be little doubt that the records fail to disclose a free and voluntary waiver on his part. The endorsement on the indictments clearly show he appeared personally and it also shows he had no counsel at any time during the proceedings. As this Court has immediate access to the records, it would be of little benefit to enclose such copies as one in possession of petitioner. The endorsement on the indictment show the following:

"All three defendants personally appear and withdrew their pleas of not guilty heretofore entered and plead guilty of the crime of Robbery, first degree, unarmed. June 1, 1931. Nova, J. Mr. Sullivan, A. D. A. All remanded, Part 3."

On the back of the indictment designated for the name of assigned counsel, appears the name of "Frank Canizio,"

the petitioner. It also shows where the petitioner previously was arraigned and pleaded not guilty on May 25, 1931, and also the notation "State Prison at Sing Sing: Minimum fifteen (15) years; maximum thirty (30) years. June 19/31 Nova, J. * * *".

As has been pointed out in the preceding consideration, that while an accused may waive the right to counsel, [fol. 29] whether there is a proper waiver should be determined by the record of the proceedings, it being appropriate that such a waiver would appear on the record as was said by the United States Supreme Court in Johnson v. Zerbst, supra:

> "The constitutional right of an accused to be represented by counsel invokes of itself, the protection of the trial court, in which the accused, whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is a proper waiver by the trial court, and *it would be fitting and appropriate for that determination to appear on the record.* (Italics ours.)

The Court of Appeals of this state in definite and unambiguous language states that such a waiver *must* appear on the record. In People v. McLaughlin, supra, the Court said:

> "not only must this primary right be protected, but *there must be a record of all proceedings that have a bearing thereon,* so that intelligent review may be had. The record before us does not show adequate protection of this defendant's rights, and so his conviction cannot stand. In such a situation, the absence of exceptions is no bar to a reversal. People v. Bradner, 107 N. Y. 1; People v. Miles, 289 N. Y. 360." (Italics ours).

The records in the case of petitioner is void of any such waiver by reason that no such waiver was executed in any manner shape or form. The circumstances of the case, inasmuch as the petitioner was totally ignorant of his right to [fol. 30] counsel and the Court or no one else informed him of such right precludes and makes impossible any waiver.

How could a 19-year-old boy waive a right he did not know even existed?

From all the eminent authorities on the subject it might be concluded that a waiver of this fundamental right must be executed by one in the knowledge of its existence, and made part of any proceedings. Without this prescribed action by a Court, the jurisdiction is lost. The principle which exacts this compliance with constitutional provisions and legislative mandates and prohibitions are illustrated by many cases, both in State and Federal Courts, because criminal prosecutions must be conducted in substance and without essential change as the Federal and State constitutions demand. It is not a mere error at law, it is the denial of a constitutional right. In Glasser v. United States, 62 S. Ct. 457, Justice Murphy in delivering the opinion of the Court, said:

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we must indulge every reasonable presumption against the waiver of fundamental rights."

See also Aetna Insurance Co. v. Kennedy, 301 U. S. 389; Ohio Bell Tel. Co. v. Public Utilities Comm. 301 U. S. 292; New York State Constitutional Convention Report of 1938, Vol. 6, p. 75; United States ex rel. Nortner v. Hiatt, 33 Fed. Supp. 545.

[fol. 31] CONCLUSION

The Judgment of the Kings County Court of June 19, 1931, Sentencing the Petitioner to State Prison for Fifteen to Thirty Years Is Null and Void, and in the Interests of Justice Should Be Vacated and Expunged from the Records

Respectfully submitted, Frank Canizio, Petitioner in Person, 135 State Street, Auburn, N. Y.

Dated at Auburn, N. Y., the 27 day of December, 1944.

[fol. 32] CERTIFICATE OF CLERK

I, Francis J. Sinnott, the clerk of the Kings County Court, state of New York, hereby certify that I have examined this typewritten record of the papers concerning People v.

Canizio, compared them with the original on file in this office, and certify that they are a true copy of said original.

Francis J. Sinnott, Clerk, Kings County Court.

Dated, June 15th, 1945, at Brooklyn, New York.

[fol. 33] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 152

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—October 8, 1945

On Consideration of the motion for leave to proceed *in forma pauperis* herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this motion.

[fol. 34] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1945

No. 152

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the County Court, Kings County, State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

Endorsed on Cover: In forma pauperis. Enter petitioner, pro se. File No. 49,855. New York, County Court, Kings County. Term No. 152. Frank Canizio, Petitioner, vs. The People of the State of New York. Petition for a writ of certiorari and exhibit thereto. Filed June 22, 1945. Term No. 152 O. T. 1945.

[fol. 21] STIPULATION AND ADDITION TO RECORD

SUPREME COURT OF THE UNITED STATES

FRANK CANIZIO, Petitioner,

against

THE STATE OF NEW YORK, Respondent.

It is hereby stipulated by and between the attorney for the Petitioner and the District Attorney of Kings County that certain material consisting of a notice of appearance dated October 17, 1931, signed by John J. Oliva on behalf of the petitioner, in the Kings County Court, an extract from the clerk's minutes, and a stenographic transcript of proceedings on sentence dated October 19, 1931, all duly certified by the County Clerk of Kings County, may be printed as part of the record of the above entitled appeal.

Dated, Brooklyn, N. Y., November 7, 1945.

Maurice Edelbaum, Attorney for Petitioner Canizio.
George J. Beldock, District Attorney of Kings County.

[fol. 22] [Endorsed:] Supreme Court of the United States. Frank Canizio, Petitioner, against The State of New York, Respondent. Stipulation. George J. Beldock, District Attorney, Kings County.

[fol. 23] [Stamp:] Office of the Clerk. Nov. 8, 1945. Supreme Court, U. S.

COUNTY COURT, KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

FRANK CANIZZIO

NOTICE OF APPEARANCE

To the Clerk of the County Court, Kings County:

SIR:

You are hereby notified that the undersigned appear for the defendant(s) in the above entitled action Frank Canizzio, Robbery, 1st degree.

Date June 17, 1931.

John J. Oliva, Attorney for Defendant. Office & P. O. Address 53-63 Park Row, Manhattan, New York City.

STATE OF NEW YORK,
County of Kings, ss:

I, Francis J. Sinnott, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being at Court of Record) Do Hereby Certify that I have compared the annexed with the original Notice of Appearance filed in my office June 17, 1931 and that the same is a true transcript thereof and of the whole of such original.

In Testimony Whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 2nd day of November, 1945. Francis J. Sinnott, Clerk.

[fol. 24] Friday June 19, 1931.

Present: Hon. Algeron I. Nova, County Judge.

Proclamation made and Court opened.

90/130B: Frank Canizio, #3465B, Male, White. Indicted for Robbery, first degree, Grand Larceny, second degree, Assault, second degree, and convicted of the crime

of Robbery, first degree, unarmed, upon his own confession and plea of guilty.

Being personally present and sworn says: My true name is Frank Canizio; I am 19 years of age; I was born in Brooklyn; I reside at 1178 72nd Street; I am a printer; I am not married; I can read and write; I have a Public School education; grade 7B; I am a Catholic, irregular attendant; my parents are dead; I am temperate; I do not use drugs; I have never previously been convicted of a felony.

Being asked and he having nothing to say why the judgment of the law should not be pronounced against him, the Court pronounced judgment as follows:

Whereupon, it is Ordered and Adjudged by the Court that the said Frank Canizio, for the felony aforesaid, whereof he is convicted, be imprisoned in the State Prison at Sing Sing, at hard labor, under an indeterminate sentence, the maximum of such imprisonment to be thirty (30) years and the minimum thereof fifteen (15) years.

It is Ordered by the Court that the Sheriff of the County of Kings forthwith take the above named defendant and safely deliver him to the custody of the Warden of the State Prison at Sing Sing.

STATE OF NEW YORK,
County of Kings, ss:

I, Francis J. Sinnott, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being at Court of Record) Do Hereby Certify that I have compared the annexed with the original Minutes filed in my office June 19, 1931, and that the same is a true transcript thereof and of the whole of such original.

In Testimony Whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 2nd day of November, 1945. Francis J. Sinnott, Clerk.

[fol. 25] COUNTY COURT OF THE COUNTY OF KINGS, PART I

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

FRANK CANIZIO, PATSY GUARIGLIA, TONY BRUNO, Defendants.

Before Hon. Algeron I. Nova, County Judge.

Brooklyn, June 19, 1931.

APPEARANCES:

Counsel for all defendants.

The Court (as the lawyer attempted to speak): We have discussed this case, haven't we? There isn't anything in the world that you can say to me that is going to change my mind on these sentences. I have lived with this case.

Counsel for Canizio: I have the sister of the defendant here. I would like to have your Honor hear her just a moment. I think it is very important that you should hear the sister of Frank Canizio.

Counsel for Bruno: In the Bruno case, the counsel for the defendant Bruno is not here. He is in Queens.

The Court: I know all about that boy. You don't need him here because I have got my mind made up what to do [fol. 26] with him. If he were here it would not make any difference.

Counsel for Bruno: He asked me to request your Honor to hold this matter over until Monday.

The Court: No; I am going to sentence this morning. (To the sister of Canizio) What do you want to tell me about your brother? I don't want to hear your feelings. I know his whole history.

Counsel for Canizio: Tell the Judge how long he has been living with you, how long your mother is dead, how long your father is away in California.

The Court: I don't need to have them tell it. I have the complete social history from our investigation. I have got it all.

Counsel for Canizio: I wanted her to tell your Honor something about her brother. Tell the Judge how he has been living.

The Sister: He is always living with me. My father deserted us two years ago.

The Court: After all, Counsellor, help me a moment. I am just as humane and human as anybody else, and if it is going to serve your purpose to have her brought here that is all right, but that does mean a thing to me. She wants me to be sympathetic with her brother.

The Sister: Please——

The Court: You listen to what I have got to say. I [fol. 27] cannot be sympathetic with him, because I have a duty to do. I advise you to leave the court-room now because what I am going to do is not going to be pleasant for your sense of hearing. If you want to stay in the court-room you can stay, but it is not going to be pleasant.

Counsel for Canizio: If your Honor please——

The Court: Now listen Counsellor, don't give me that kind of stuff at all. Don't bring these clients up to me because you think it is going to help you earn your fee in any way. You don't have to do that with me. That is all. My job is here and it is hard enough as it is without you lawyers making it harder for me.

Counsel for Guariglia: In the Patsy Guariglia case your Honor knows the facts and I leave it in your hands.

The Court: You lawyers know what I am talking about. I permitted you to sit in my chambers, and that is an unusual thing. Seldom do I permit lawyers to do it. We have analyzed the facts of the case and how we made up the sentences. Why stand here with your clients and try and upset it when there is no good purpose?

This is Indictment No. 2465 against Frank Canizio, Patsy Guariglia and Tony Bruno. Patsy Guariglia is 16 years of age, living with his sister and has never been in any trouble before. He had a truancy charge against him, and it was out of the Parental School, but in my mind that does not mean a thing. It does not establish any criminal tendency. Bruno [fol. 28] is 17 years of age and lives with his mother, and he is out on probation under a suspended sentence out of this court at 17 years of age. Let the record recite that he needs a tremendous amount of medical attention because if my report is correct he is terribly diseased. Canizio is 19 years of age and has had his experience of being in the House of Refuge where he was sent because of his violation of his previous admission into the Catholic Protectory.

What are the facts in this case? These three defendants under the guidance of Canizio—and the facts in the case

will show that I am right, and even at the expense of repetition I would say this is not pleasant for me to do and I don't like to do it, but the law compels me to do it and I have got to live up to my oath. I don't tell these people who come before me that they should go out and commit these terrible things. These three boys and others held up a taxicab man. They took a ride with him and then after they took his car they used it to hold up with guns and out of two or three hold-ups all they got was fifty cents. Then the next day they had a stolen Buick car. One of these three defendants, I don't remember who it was (or one of the other two that have not yet been tried) was in another robbery case. I don't know how many robberies these fellows committed, but the record shows that Canizio was [fol. 29] the leader. At any rate they stole a Buick car and a fine detective in this case, a splendid gentleman, likewise of Italian extraction, such as these young men, became apprehensive when he saw them in the Buick car that they were about to go out on another job and he determined not to permit them to carry out or to complete the crime that they were about to commit, and ran their car over to the curb, and when he did that the guns fell to the bottom of the floor of the Buick car that they had and were using, and which was stolen. What are the guns? There were two 32's, I think it was, loaded and well-oiled, so that there would not be any trusting to luck that they would not operate, because I examined the guns and the oil was oozing out around the barrel and around the trigger. Then there was another .45 gun, and they did not have the bullets for the .45 but they were so smart that though they did not have .45 bullets, they took .38 bullets and they packed the .38 bullets on the outside with wadding to make them fit within the .45 gun. The bullet would not travel the distance that a .45 would have travelled, but it would go at least 100 yards, which would accomplish their purpose. In the .32 guns admitted by Canizio, and he also admitted in open court that the other .45 was his gun and that he supplied the guns—in the .32 guns they had the tips of the bullets split so that when one would enter a body it would [fol. 30] spread and make certain of injury. A lucky thing that the policeman in this case, who should be publicly complimented—did not permit those boys to go on this nefarious undertaking, which undoubtedly would have resulted in a felony murder, if they did not receive themselves

for it, the bullet from the policeman's gun. But the policeman stopped them. We figured around here for hours about the question of a plea to the indictment as charged unarmed and for the disposition of other charges against them. Canizio said, "Why don't you give us a break?" I said, "What kind of a break would you give the cops in this case when you had the lay on them and they did not stop it?" And his brazen answer, "I did have the lay on them and could have given him the works; but I did not do it." What a high-handed piece of effrontery that was coming from the mouth of a 19-year old defendant who served a term in the House of Refuge and had his opportunity along the lines of reformation and did not accept it! He accepted the responsibility of the guns in the case; but there is another gun, a magazine .38 which the driver of the car had in his home and admitted to the policeman that that was in the car. These young men, 16, 17 and 18 years of age, with an arsenal upon them, going out on absolute warfare! But I could go on talking about this case for hours, about these miserable and despicable things.

[fol. 31] (One of the defendants made some answer which the stenographer did not catch.)

The Court: You should deny that. You are Tony Bruno. I remember you. What a pity it all is! You were the one that had the magazine gun in your house, weren't you?

Bruno: Yes.

The Court: You were the one that drove the car.

Bruno: No; sir, I was not.

The Court: You were in the car that night?

Bruno: No; they picked me up home.

The Court: Where did you get the magazine gun you had?

Bruno: I found that gun.

The Court: Where did you find it?

Bruno: Sixty-ninth Street.

The Court: Yes, you did! You lie! That gun was traced to Elmira. That is where that gun was traced to, and one of the co-defendants is out on probation out of Elmira. You haven't got us fellows around this court bluffed, take my word for it, because when I go into an investigation I get every bit and I remember every fact. The difficulty that comes here is that people are not going to understand the difference in the sentences in this case. Here is a fellow 16 years of age, without a record, and here is another

fellow out on probation from this court at 17 years of age. The home life in both instances is miserable. The home life in Bruno's case is most unfortunate. I cannot send [fol. 32] them to Sing Sing. They are not old enough to *do* there. It would serve no good purpose if I sent them there even with all the terrible things that they did, in my judgment. That may be wrong. I say that they are not the age to go there, these two boys—the other fellow, yes. These two boys go to Elmira Reformatory and that is the sentence; that is Bruno and that is Guariglia; and let me tell you something about the new law up there. If you don't behave yourself and you don't obey the rules and if the officials at Elmira, insofar as you two fellows are concerned, are not satisfied that you are proper subjects for Elmira, they can send you away to any other state prison for the same term as I could, for the limit thereof. That means this, that any time while you are in Elmira, and in their judgment and opinion you are not fit subjects for that institution or you are incorrigible or you don't obey the rules or you don't do the right thing, all they have got to do up there is to send you over to Sing Sing for 15 years and they can do it.

Insofar as Canizio is concerned, I am going to send him to Sing Sing for a minimum of 15 years to a maximum of 30, and the reason I do it is this, that every fact and circumstance in this case show you to be the ring-leader of the mob. You, yourself admitted you supplied the guns, you admitted the ownership of the guns. When I took a plea of [fol. 33] you to this one indictment unarmed—and that was the only thing the District Attorney would consent to—in my judgment you got all the clemency that you deserved. You have been in the House of Refuge, you have had your experience. You are 19 years of age, you were old enough to acquire experience and to understand what you were doing. Having admitted that you were the one that negotiated this entire situation, and with your age and your experience, I am not permitted to send you to Elmira. I don't fix the sentence. The law fixed it. It may be that the sentence is severe even for your age, but you have this to find out, that the law of the State of New York and not the judge, fixes the sentence and you have got to find fault with the law and not with the judge that imposes the sentence. And what is more you haven't any right to find any fault with anybody, because you have been a persistent violator of

the law. You knew what you were going to do. You have got plenty of "guts", because you had the temerity to stand up before me and ask for the break, and you did not need a lawyer to make representation for you. In your case, Canizio, the sentence of the court is as pronounced, a minimum of 15 years to a maximum of 30, and your two co-defendants, Elmira Reformatory.

. . . . . .

STATE OF NEW YORK,
County of Kings, ss:

I, Francis J. Sinnott, Clerk of the County of Kings, and Clerk of the County Court in and for said County (said Court being at Court of Record) Do Hereby Certify that I have compared the annexed with the original remarks filed in my office June 19, 1941, and that the same is a true transcript thereof and of the whole of such original.

In testimony whereof, I have hereunder set my hand and affixed the seal of said County and Court, this 2nd day of November, 1945. Francis J. Sinnott, Clerk.

FILE COPY

Office of the Clerk, U. S.
FILED
NOV 6 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

Petition not printed

No. 152

FRANK CANIZIO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, NEW YORK

BRIEF ON BEHALF OF THE PETITIONER

MAURICE EDELBAUM,
Counsel for Petitioner.

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Conclusion—The order of the Kings County Court should be reversed, and the judgment of conviction rendered against petitioner of June 19, 1931, ordered vacated and expunged from the records of the Kings County Court 55

Appendix 57

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 152

FRANK CANIZIO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents

BRIEF IN BEHALF OF PETITIONER

This is a writ of certiorari to the County Court of Kings County, State of New York, which denied petitioner's motion made in a proceeding analogous to common law *coram vobis* or *coram nobis* denying the petitioner the right to be heard on issues of fact where it was alleged in a verified petition (R. 7) that on or about June 19, 1931, he was denied his constitutional right to the assistance of counsel in the County Court of Kings County when that court rendered against him a judgment imposing a sentence of from fifteen (15) to thirty (30) years in state prison for the crime of robbery in the first degree (R. 7).

The order denying petitioner's motion in the Kings County Court was made and entered on April 13, 1945, by the Clerk of that court. The motion was denied by Sobel, C. J. (R. 1).

Petitioner filed his petition for certiorari to this Court on June 22, 1945, accompanying this by a motion for leave to proceed herein in *forma pauperis* (R. 20). On October 8, 1945, this Court granted the motion for leave to proceed in *forma pauperis* (R. 20) and on the same day it granted the petition for the writ of certiorari to the County Court of Kings County.

Opinion Below

The County Court of Kings County rendered no opinion upon the denial of the motion made in that court. Its order simply reciting that: (R. 1).

> "* * * on motion of William O'Dwyer, District Attorney of Kings County,
>
> Ordered, that the said motion be and the same hereby is in all respects denied."

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, providing for a review by the Supreme Court by Certiorari of a final judgment or decree of the highest court of a State, in any cause where any title, right, or privilege or immunity is especially set up or claimed under the Constitution of the United States. The order of the County Court of Kings County in this action is a Court of the last resort or the highest Court of the State in which a decision could be had as there is no statutory authority for an appeal from such a final order to any higher State Court. (*People* v. *Gersewitz*, 294 N. Y. 163.)

Questions Presented

The questions presented by this writ of certiorari are whether the motion made by the petitioner in the Kings County Court stated a cause of action based on the denial of a title, right, privilege or immunity guaranteed to petitioner by the Constitution of the United States, and whether the County Court of Kings County should have denied the petition without an opportunity to be heard on the merits (R. 1).

Whether the County Court of Kings County on the 1st day of June, 1931, denied petitioner due process of law when it ordered entered against him a plea of guilty to the crime of robbery in the first degree without his consent or consultation; without informing him of the nature of the charges against him; without the advice of counsel; without assigning counsel or without informing him of the consequences of such a plea of guilty.

Whether the County Court of Kings County on the 19th day of June, 1931, in imposing on petitioner a sentence of fifteen (15) to thirty (30) years, without the assistance of counsel or the effective assistance of counsel deprived the petitioner of his liberty without due process of law.

All in violation of the Constitution of the United States.

Statement

On May 25, 1931, the petitioner was indicted by the Grand Jury for the County of Kings for the crime of robbery in the first degree, Grand Larency in the second degree and Assault in the second degree. The indictment contained three counts all based on the same set of facts (R. 2). On that same day he was arraigned without counsel and pleaded not guilty to the indictment (R. 2). On June 1, 1931, he was again brought to Court (R. 9, 10, 11). He was again without counsel, he was not informed of his right

to counsel nor was counsel assigned by the Court. On this arraignment the petitioner was asked but one question:

"The Court: This is indictment No. 3465-b against Frank Canizio, Patsy Guariglia, and Tony Bruno. They are indicted for robbery in the first degree, grand larceney in the second degree, and assault in the second degree in that on May 22nd, 1931, they robbed one Joseph Grosshandler of a taxicab valued at $500, armed with a gun. Canizio, how old are you?

Canizio: Nineteen, Your Honor" (R. 9).

He was not asked if he wanted to plead guilty or not guilty and stand trial or if he needed a lawyer. The Court after a short discussion with the Assistant District Attorney ordered the clerk to enter a plea of guilty to the crime of robbery in the first degree against petitioner (R. 11).

The petitioner being in absolute ignorance of all Court procedure believed this manner of procedure was legal. He was a nineteen year old boy without any parents, without any education, without money or friends who might help him and without counsel to tell him different. He believed having no money to employ an attorney he must do without one. He had never before been convicted of any crime.

On June 19, 1931, he was arraigned for sentence. He was again in the same miserable predicament and still without counsel, nor did the Court assign him counsel. He was sentenced to a term of imprisonment of fifteen (15) to thirty (30) years in state prison as the result of the plea ordered entered by the court for the crime of robbery in the first degree.

All the records of the Kings County Court are available and the above recitals appear from them and the fair infer-

ences and reasonable intendments to be drawn from them and which this court must judicially notice are as follows:

That the petitioner was a nineteen year old infant at the time and subject to all the legal disabilities and incompetency that attach to an infant.

That no counsel would have permitted the court to enter a plea of guilty to the crime of robbery in the first degree against petitioner without his consent or consultation.

That petitioner, without the aid of counsel, could not have known the elements required under the laws of the State of New York to constitute the crime of robbery in the first degree, or the defenses thereto, or of the complex and intricate distinctions between robbery in the first degree, robbery in the second degree, robbery in the third degree or the various degrees of grand larceny.

That petitioner was under the circumstances unable to form an intelligent judgment without the advice of counsel. That under the conditions prevailing he could not know that the entry of a plea of guilty to the crime of robbery without his consent or consultation was in palpable violation of all the fundamental principles of constitutional law and justice.

That petitioner under the circumstance and conditions prevailing is not presumed to know he was entitled to a trial by jury on the facts alleged in the indictment and must be found guilty beyond a reasonable doubt.

That prosecuting attorneys are on many occasions in cases such as this, sometimes overly zealous to obtain convictions. That being the criterion by which their efficiency is determined.

That petitioner, having been confined in state prison ever since, and being without funds to obtain legal advice and his ignorance of his right to counsel precludes any waiver

of the constitutional right; that he was inacapable adequately of making his own defense or bringing suit to enforce his rights as he was an ignorant boy with no knowledge of the law. He was a pauper infant and unable to employ counsel.

That petitioner may well have only now, through another inmate, discovered the fact that he had a right to the effective assistance of counsel at every stage of the proceedings, that he had a right to a trial by jury and that none other than himself, with the proper aid of competent counsel, may be authorized to plead guilty for him in any criminal proceeding.

That all the aggravated and other denials of the many statutory and constitutional rights in this case stem directly or indirectly from the denial of the constitutional right to the assistance of counsel at all stages of the criminal proceedings in this case.

ARGUMENT

Point First

For purposes of Review in this Court under Section 237 of the Judicial Code, the final order of the County Court of Kings County denying the petitioner's motion without a hearing, not reviewable in any other State Court, is a decision by the highest court of the State in which a decision could be had.

In *Whitman* v. *Wilson*, 318 U. S. 688, this Court held in an interpretation of *Lyons* v. *Goldstein*, 290 N. Y. 19, as follows:

> "After oral argument in this court, the Court of Appeals on March 4th, 1943, decided the case of Lyons v. Goldstein, 290 N. Y. 19. It was there held that despite the lapse of time, a state court in which the judgment of conviction has been entered, retained jurisdiction,

analogous to the common law jurisdiction upon writ of error coram nobis; * * * The opinion rests in part on the requirement of the Due Process Clause that a prisoner be granted a hearing on the merits of such a contention."

If, then, it is recognized the remedy by a proceeding *coram nobis* exists in this state, it must also be held that all the characteristics incidental to the writ are also recognized, especially the finality attributed to the order in such a proceeding, more so when they are not abolished, limited or abrogated by statute. Another of these characteristics is, that an application for such a writ is not a proceeding incidental to a criminal prosecution, but by the English common law a writ of error *coram nobis* or *coram vobis*, being a special form of a writ of error, commenced an entirely new proceeding (Bauvier, Law Dict. (Rawle's rev.) "Writ of Error"; 2 Tidd. 1134, 1141; *Jaques* v. *Ceaser*, 2 Saund. 100). The aggrieved party "purchased" an original writ (*Rex* v. *Davis*, 1 Burr. 638), and he could employ a new attorney without the consent of the Court, which under the rules then existing was a sure mark of a separate suit (*Batchelor* v. *Ellis*, 7 Term Rep. 337; 2 Tidd. 1141).

The averments by this petitioner in the motion to the County Court of Kings County were to the effect that the judgment procured against him was in palpable violation of his constitutional rights. He commenced this proceeding with the object of establishing that fact, because in establishing such fact it must be held that such judgment is void. No more appropriate mode of procedure could be invoked; in fact it was for a proposition of a like nature that the writ of *coram nobis* existed. In the words of Justice Doerfler in *Ernst* v. *State*, 181 Wis. 155, 193 N. W. 978 (1923), "serving the purpose of protecting certain fundamental and inalienable rights with respect to life,

liberty and property and affording pursuant to the maxim of the common law, a remedy wherever there is a wrong." The petitioner alleged that he was in fact denied his constitutional right to the assistance of counsel. If this fact is disputed then he should be permitted to establish it in such a proceeding. "It follows that the allegations of fact in the petition are sufficient to make out a prima facie case of violation of these constitutional rights of the petitioner, sufficient to invoke corrective process in some court, and in the federal district court if none is afforded by the state" *White* v. *Regan*, No. 212, October Term, 1944. And it has been established by the Court of Appeals of this state that such a corrective process is recognized in this state by a writ of error *coram vobis* or *coram nobis*: *Lyons* v. *Goldstein, supra; Whitman* v. *Wilson, supra;* Matter of *Morhaus* v. *Supreme Court*, 293 N. Y. 131. The latter case is a prohibition against habeas corpus. The affidavit in response to petitioner's motion raised the issue of fact, he states that (R. 3):

> "I have spoken to Mr. Rudolph Gross who appears to have been the clerk in the part on June 1, 1931, when the plea of guilty was taken, and Mr. Gross states that to the best of his recollection it was not his procedure when a case appeared on the trial calendar for trial, but where a defendant withdrew a previous plea of not guilty, and wished to plead guilty, to advise the defendant of his right to counsel. However, this does not foreclose the possibility that the trial court itself thus advised the defendant or that he had been so advised at the time of arraignment."

Then again Mr. Seigel in his affidavit continues to beat his retreat from responsibility by further vague possibilities that might have existed (R. 3). He avers:

> "It is possible that during that time records which formerly existed have disappeared."

It is hard to comprehend what records he could have reference to. All the records in the case, including the official stenographic minutes giving a verbatim and intelligible account of the proceedings had of June 1st, 1931 are intact and available. However unreasonable and absurd these possibilities put forward by the respondent are, they are nevertheless an attempt to controvert the affidavit of the petitioner on the original motion and raise a question of fact on which the petitioner should have been heard. To deny him a hearing in person was to deny him due process of law. The mode of procedure he invoked was such as is recognized by the highest court in the state, and has been held by this court as the proper mode where issues of fact are to be determined. The Kings County Court is a court of competent jurisdiction, and may not, by its denial to hear petitioner convert the constitutional right of petitioner into a matter of discretion. This principal is recognized by the Court of Appeals in *Lyons* v. *Goldstein*, *supra:*

> "Although the Constitution contains no description of those processes which it was intended to allow or forbid, it was not left for the legislative power to enact any processes which might be devised. Den. ex. dem. Murray v. Hoboken Land and Improvement Co., 18 How. 272, 15 L. Ed. 372."

And the procedure invoked here was further clarified in the same case; that this "power was exercised in criminal cases at common law through the writ of error coram nobis," *Robinson* v. *Johnson*, 118 F. (2d) 998; *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16.

However, notwithstanding the recognition of the existence of this common law remedy there is no appeal in this state from the order denying such a motion. The right to appeal is strictly a statutory right and according to the

law laid down by the Court of Appeals in the State of New York there is no statutory authority for an appeal from the order denying petitioner's motion by the Court of Kings County. In *People* v. *Gerscwitz* (1945), 294 N. Y. 163, the Chief Justice writing for the court on that occasion said:

> "Perhaps the omission of the legislature to provide for an appeal from an order denying a motion to vacate a judgment of conviction should not be construed as an intentional denial to an aggrieved defendant of a right to appeal. Arguments not without force may be made that when the legislature in Section 517 of the Code of Criminal procedure enumerated 'in what cases appeal may be taken by defendant' is intended to cover only the field in which the courts exercised authority established by statute without considering whether this remained an undefined field in which the courts might exercise 'inherent' authority not established by statute. In a long line of cases this court has consistently applied the principle that the Code of Criminal Procedure 'establishes the practice in all criminal cases and authority for the orders and judgments of the courts' within the field where the legislature may grant authority to a court or may withhold it (People ex rel. Hirschberg v. Orange Co. Ct., 271 N. Y. 151, 153). The court nonetheless recognized, at the same time, that courts have always asserted and exercised authority which though perhaps not expressly established by statute, is 'based upon the inherent right and duty of the courts to protect the citizen in his constitutional prerogatives and to prevent oppression or persecution. It is a power,' the Court said, 'which neither the Legislature can curtail nor abolish, and, to the extent that legislative enactments are designed to effect either of these ends, they are unconstitutional,' People v. Glen, 173 N. Y. 395, 400). We have sanctioned the exercise of such a power by a court to correct its own records or to set aside an order or judgment which was induced by

> fraud or procured in violation of a constitutional right of a party. * * * We held that a motion to vacate a judgment procured in violation of the defendant's constitutional rights is the corrective judicial process which is authorized by the law of the state to remedy the alleged wrong to the defendant, and that it adequately meets the requirements of 'Due Process.' The problem now presented is whether the appellate court may entertain an appeal from an order of the court in which the conviction was had denying the motion to vacate the conviction, though the Code of Criminal Procedure does not provide for an appeal from an order in a criminal action or proceeding except where the order is made pursuant to practice and authority established by statute."

However, it was then and there decided in the *Gersewitz* case that there was no appeal from the order. The error of the interpretation of the common law by the Court of Appeals would seem to be in a misunderstanding of the ancient writ of error *coram vobis* or *coram nobis*. But as that court's interpretation is final in the matter we must abide by it. The writ of error *coram nobis* is not a proceeding incidental to the criminal proceeding, it is a new proceeding. It is the commencement of a new action. Under the common law the order in such a proceeding was a final order and while the writ of error *coram nobis* came into existence as an "original" writ in the sense that it was a writ by which a new proceeding was commenced, so likewise did the writ of *scire facias* and the writ of mandamus, but these writs, like the writ of error *coram nobis* have been employed many times as auxiliary to the jurisdiction of a court in a pending suit, *Winder* v. *Caldwell*, 14 How. 434, 14 L. Ed. 487; *Ewing* v. *United States*, 6 Cir., 240 F. 241; *Marbury* v. *Madison*, 1 Cranch 137, 2 L. Ed. 60; *Pickett's Heirs* v. *Legerwood*, 7 Pet. 147, 8 L. Ed. 638; *United States* v. *Steese*, 3rd Cir., 144 F. (2d) 439. See also, Orfield, "Writ

of Error Coram Nobis," 20 Va. L. Rev. 423; 10 Neb. L. Bull. 314; 11 id. 421; Freedman, "The Writ of Error Coram Nobis," 3 Temple L. Quart. 365; Gordon, "Certiorari and the Revival of Error in Fact" (1926), 42 L. Q. Rev. 521; Gordon, "The Observance of Law as a Condition of Jurisdiction" (1931), 47 L. Q. Rev. 557.

In *Wiley* v. *United States* (1944), 144 F. (2d) 708, in discussing the finality of such an order the Court said:

> "The District Court has the jurisdiction of the issue tendered by the motion, even if the motion be deemed to be made after the extended period of the term of court. Holiday v. Johnson, 313 U. S. 342, 249, 350, 61 S. Ct. 1015, 85 L. Ed. 1392. The court's decision in a proceeding in the nature of coram nobis is a final order and hence appealable here. Cf. Robinson v. Johnson, 9 Cir., 118 F. (2d) 998, 1000."

From all the most eminent authorities on the subject it must be conceded that the order of the Kings County Court denying the petitioner's motion was a final order as that court had "jurisdiction of the issue tendered by the motion." The fact that the statutes of this state afford no appeal from such a final order does not detract one whit from its force of finality as far as this court is concerned. To contend to the contrary would be to base the jurisdiction of the Supreme Court of the United States in the discretion of state legislatures. The order of the Kings County Court was a final disposition of the issues presented in the petition of the proceeding instituted. In the light of the decisions of the highest court of this state the proceeding was proper and petitioner has not "misconceived the mode by which his constitutional claim may properly be brought before the New York courts," as stated by respondent in page 8 of his brief in opposition to the granting of the writ.

The order being a final order and for purposes of review in this court it is a decision of the highest court in the State

of New York in which a decision could be had. That problem has been settled in this court on more than one occasion. In *Betts* v. *Brady* (1942), the case so strongly relied on by the respondent in his original brief to this court, this court said when confronted with the non-appealability of an order of a judge of the State of Maryland:

> "In view of what has been said of the power of Judge Bond as a judicial tribunal to hear and finally decide the cause, and of the judicial quality of his action, we are of the opinion that his judgment was that of a court within the intendment of Sec. 237.
>
> "Did the judgment entered comply with the requirement of Sec. 237 that it must be a final judgment rendered by the highest court in which a decision could be had? Again answer must be made in the light of the applicable law of Maryland. The judgment was final in the sense that an order of a Maryland judge in a habeas corpus case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances named in statutes which are here inapplicable (see note 7). It is true that the order was not final, and the petitioner has not exhausted state remedies in the sense that in Maryland, as in England, in many of the states, and in the federal courts, a prisoner may apply successfully to one judge after another without exhausting his right. (See note 8). We think these circumstances does not deny to the judgment in a given case the quality of finality requisite to this court's jurisdiction. Although the judgment is final in the same sense that it is not subject to review by any other court of the state, we may, in our discretion, refuse the writ when there is a higher court of the state to which another petition for the relief sought could be addressed (See note 6), but this is not such a case. To hold that, since successive applications to courts and judges of Maryland may be made as of right, the judgment in any case is not final, would be to deny all recourse to this court in such a case.

> "Since Judge Bond's order was a final disposition by the highest court of Maryland in which a judgment could be had on the issue joined in the instant petition we have jurisdiction to review it."

To the same effect is *Jamison* v. *Texas* (1943), 318 U. S. 413, also *Tenner* v. *Dullea* (1941), 314 U. S. 692, and in *Largent* v. *Texas* (1943), 318 U. S. 418 it was said:

> "The possibility that the appellant might obtain release by a subsequent and distinct proceeding, and not one in the nature of a review of the pending charge, in the same or a different court of the State does not affect the finality of the existing judgment or the fact that this judgment was obtained in the highest state court available to the appellant." (Citing cases.)

The petitioner submits, that if the contentions of the respondent in his brief which he submitted in opposition to the granting of the writ that only from the judgment of conviction could a review by this Court be had are made again should be dismissed as frivolous and have no merit. To sustain his argument would be to hold and limit the jurisdiction of this Court in all other proceedings merely by the omission of State Legislatures to provide the right to appeal from such orders. The only reasonable conclusion that can be arrived at after an examination of all the authorities on the subject is that:

1. The order of the Kings County Court was a final order disposing of the issue tendered by the motion, and

2. Judge Sobel's order was a final disposition by the highest court of New York in which a decision could be had on the issues joined.

POINT SECOND

The petitioner was entitled to a full and complete hearing on his allegations that he was denied his constitutional right to counsel in the criminal action had against him in the Kings County Court where he was charged with the crime of robbery and thereafter sentenced to a maximum term of imprisonment for thirty years. The assistance of counsel, in the circumstances there was guaranteed by the due process clause of the Fourteenth Amendment.

In the light of the decisions of this Court (*Johnson* v. *Zerbst*, 304 U. S. 458); The Federal Circuit Court (*Evans* v. *Rives*, 126 F. (2d) 633); the New York Court of Appeals (*People* v. *McLaughlin*, 291 N. Y. 480); the New York Appellate Division of the Supreme Court (*People ex rel. Mooke* v. *Hunt*, 258 App. Div. 24); Supreme Court, Washington County (*People ex rel. Harrison* v. *Wilson*, 29 N. Y. S. (2) 809); and the County Court of Kings County (*People* v. *Sedlak*, 53 N. Y. S. (2) 51), the vague possibilities pointed out by the answering affidavit of the respondent district attorney that petitioner waived his right to counsel are not only absurd but border on misrepresentation and oppression. All the records that would have been part of the judgment roll in an appeal from the judgment of conviction are still available. Not one whit of them have been destroyed. They show a verbatim account of all the proceedings had at the time. In the absence of these records the respondent might have a weak chance to indulge in his contention of the rule of presumption, but their existence forecloses all that. Moreover, it would be ridiculous to conclude that an ignorant 19-year old boy defendant knew of his constitutional right to counsel, or that he intelligently and competently waived it with full knowledge of the terrible predicament he was in, when half the judges and lawyers in both Federal and State courts did not recognize the

principle later enunciated in *Johnson* v. *Zerbst*, 304 U. S. 458, and the decisions which stem from it and *Powell* v. *Alabama*, 287 U. S. 45, both of which were decided *after* the conviction of this petitioner. This Court in *Rice* v. *Olson*, No. 391, October Term, 1944, decided April 23, 1945, restated that principle with even greater force when Mr. Justice Black in writing the opinion for the court said:

> "Whatever inference of waiver could be drawn from the petitioner's plea of guilty is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action. This denial of waiver squarely raised a question of fact. That State Supreme Court resolved this disputed fact by drawing a conclusive implication from the petitioner's plea of guilty. This is the equivalent of a holding that one who voluntarily pleads guilty without the benefit of counsel has thereby competently waived his constitutional right to counsel, even though he may have sorely needed and been unable to obtain legal aid. A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary. It is enough that a defendant charged with an offence of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandably waive counsel (Williams v. Kaiser, 323 U. S. 471; Tompkins v. Missouri, 323 U. S. 458; House v. Mayo, No. 921, decided February 5, 1945). Whether all these conditions exist is a matter which must be determined by evidence where the facts are in dispute."

The records in the case of petitioner disclose a violation of his rights guaranteed by the national and state constitutions of a much greater aggravation than in any of the cases cited above. It could not be even inferred in his case that his guilty plea was an indication that the right to counsel was competently and intelligently waived. *He was not even accorded the right of pleading guilty or not guilty.* All that was done for him without even his consent or con-

sultation. These are not vague possibilities or frivolous presumptions. They are positive facts corroborated by the certified records of the Kings County Court. At one time if the record on appeal failed to disclose even a plea of not guilty on arraignment the subsequent judgment would be invalid. (*Crain* v. *United States*, 162 U. S. 625; *Elick* v. *Wash. Terr.* 1 Wash. T. 138; *State* v. *Walton*, 50 Or. 142). It would still be invalid if the absence of a plea of not guilty to the indictment affected any substantial right of a defendant (*Garland* v. *Washington*, 232 U. S. 642). How much more is the violation aggravated when the record so clearly shows no personal plea of guilty whatever but an order of the court to the clerk to enter such a plea, no counsel to advise an ignorant 19-year old boy, never before convicted of crime and consigned to rot in a dungeon for thirty years in violation of all the constitutional and natural laws of justice and fair play. It was stated by the respondent that the petitioner knew of his rights to counsel and based his assertion on the fact that because of a prior arrest for juvenile delinquency the petitioner knew of the constitutional right. That question was expressly answered by Justice Johnson in *United States ex rel. Nortner* v. *Hiatt*, 33 F. Supp. 545 when he said:

> "Personal rights and liberties assured by our constitution are to be jealously guarded, and this court does not agree * * * that a waiver of these rights should be implied. The only way by which a defendant can waive such rights is by a competent and intelligent waiver when acting in full knowledge of his rights and constitutional guarantees. In determining whether he has waived his rights to counsel the particular facts and circumstances of each case will control, including the background, experience and conduct of the accused. Johnson v. Zerbst, 304 U. S. 458. *As a juvenile the relator was twice in custody of a Court, but the circumstances of this case, together with the evidence and the state of the record show nothing indicative of a com-*

petent and intelligent waiver of the relator's right to the assistance of counsel. The relator is entitled to be released upon the writ of habeas corpus sued out in this court." (Italics petitioner's)

And the controlling decisions of this state lay down the same principle. In *People ex rel. Moore v. Hunt*, 258 App. Div. 24, the court said:

> "It is true that relator had once been convicted of a crime. It is true that his testimony here contains no statement that he was in fact ignorant of his right to counsel. It may be said that it should therefore be presumed that he did in fact know of his right to counsel. This, however, is the very presumption which the law says may not be indulged, when it prescribes that a defendant accused of crime must be informed of his right to counsel at all stages of the proceedings. Also it must be remembered that defendant was a layman brought before the County Court immediately after his indictment and that the court and its surroundings were new to him at least in so far as this charge was concerned."

Is it suggested that petitioner must have known the various judicial constructions given to the statutes concerning the various degrees of robbery in this state, and that he was capable of applying them in his own defense? Did his arrest for juvenile delinquency give him such qualifications? Indeed, even if the petitioner had been a man of good education, and had experience in Court procedure, it is submitted that he would be incapable of presenting an adequate defense to a charge of robbery in the first degree in the State of New York. But we have the facts that petitioner had none of these characteristics or abilities, on the contrary, he was a nineteen-year old penniless boy, without parents, without friends, with no education. To him the New York statutes were a sealed book, and even were such a book unsealed to him he could not have read it with comprehension. No pre-

sumption can be sustained that such a defendant knows of his constitutional right to counsel. On this problem the court in *Evans* v. *Rives*, 126 F. (2) 633, said very clearly that:

> "*There is no more basis for such a presumption than for one that a defendant understands the rules governing the sufficiency of indictments, the admissability of evidence, and the burden of proof, or other rules of substantive and adjective law*, and the existence of such a presumption is negatived by the statement of the Supreme Court in Johnson v. Zerbst, that * * * 'The purpose of the Constitutional guaranty of right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights.'" (Italics petitioner's)

Under the judicial interpretations of the Constitution of this State, Article 1, section 6 and the Legislative mandates made in pursuance of the Constitution it is well settled, that where an accused appears alone on his arraignment without counsel, he must be asked if he desires counsel. It is not the function of the accused to see that the right is accorded him, because, as stated above, he is not presumed to know he is enfitled to the benefit of counsel. The Legislature has seen fit to enact positive statutes placing such a duty on the judicial officer before whom he is arraigned to so advise him. (New York Code of Criminal Procedure, Sections 8, 188, 308, 309.) It cannot be said that one arraigned may waive the mandatory duties imposed by law upon a court. To so permit would mean that the duties of courts were dependant upon the action of arrested persons, rather than upon the action of the Legislature. In such a case, the statutory requirements might be readily nullified merely by obtaining from the arrested person a so-called waiver. This would require again consideration of whether the waiver was voluntarily made and "competently and intelligently" entered into. It can be reasonably presumed

that when a person appears in court on a criminal charge (where he is subject to imprisonment for thirty years on conviction), without counsel, that he is either too poor to employ counsel or that he does not know he is entitled to counsel. It is in the recognition of such realisms that the Legislature has enacted the statutes cited above. They all place an affirmative and positive duty on a court to see that a defendant is accorded his constitutional rights. The highest court in this State has laid down the law on the subject. In *People* v. *McLaughlin*, 291 N. Y. 480 it was said:

> "Not only must this primary right be protected, *but there must be a record of all the proceedings that have a bearing thereon*, so that intelligent review may be had. *The record before us does not show adequate protection of this defendant's rights*, and so his conviction cannot stand." (Italics petitioner's)

To presume that this petitioner waived his right to counsel would be to erect one presumption on another. First, it would have to be presumed he knew of this constitutional right to counsel; second, to again presume he waived the right. Such is not now the law, nor has it ever been the law, because the law has never allowed one presumption to be erected on another, nor one inference on another inference. Section 308 of the New York Code of Criminal Procedure provides in part as follows:

> "If the defendant appears for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel * * *."

On arraignment the defendant *must* be asked if he desires counsel and the court *must* assign counsel. These mandatory duties cannot be avoided nor can it be said they have been carried out on the basis of vague possibilities that the court did its duty. It is absurd to do so in the circumstances in

this case. In fact in the face of all the evidence to the contrary it is a rank evasion from responsibility. Recent actions brought in the Kings County Court indicate there are many affected by violations of the same nature but because such violations have been the invariable practice of that particular court does not validate the judgments one whit. Must we vindicate the German war criminals in their brutal and murderous actions on human beings because of the fact the slaughters were of a wholesale nature? And for the same reason must we continue or permit to be continued their incarceration of prisoners and other unfortunate human beings (who had the courage to cry for liberty) in violation of all the principles of fundamental justice? Certainly not. Here we have an American, who as a boy of 19 years of age has been imprisoned for fourteen years in rank violation of all the Constitutions and Magna Chartas that have ever been devised by men who loved and fought for justice. Yea, who extorted these principles from Kings. Here we have a State Prosecutor advocating by a resort to the worst type of Jesuitical Casuistry that he be denied a hearing on the matter; that there is a possibility "etc, etc." In *Wendell* v. *Lavin*, 246 N. Y. 115, 158 N. E. 42, the Court of Appeals of this State in its opinion said:

> "This question must be answered, irrespective of the action of the public authorities for the last quarter of a century, and without in any way questioning their good faith * * *. Nevertheless neither practice nor intentions can modify the express provisions of the Constitution. Sometimes the interpretation of a doubtful and obscure clause in an act of the legislature, or in a constitution, may be aided by the practice which has grown up under it; but plain and clear provisions of a constitution require no such aid. They are to be brought to life and enforced, early or late, and must not be smothered by the accumulation of custom or violations."

The Federal and State Constitutions deal with fundamental principles and the courts should not strain for distinctions so that the simple provisions of the Constitution can be evaded or that any partisan prosecutor may be enabled to beat his retreat from his sworn responsibilities to uphold the Constitution. The highest court in this state had no hestitation in declaring Section 222 of the New York Code of Criminal Procedure unconstitutional when it violated these principles in waiver of an indictment of a grand jury (*People ex rel. Battiste* v. *Christian*, 249 N. Y. 314, 164 N. E. 111). Nor was there any hestitation in affirming the case of *People ex rel. Kearney* v. *Blue*, 44 N. Y. S. (2) 691 in a declaration that Section 400 of the same code was also unconstitutional. Both these statutes created a procedure that did violence to procedural standards laid down in the Constitution. Does the procedure of the Kings County Court on the arraignment of this petitioner as disclosed by the certified records of that court measure up to the procedural standards as guaranteed by the Constitution, where on June 1st, 1931 he was brought into that court and arbitrarily pleaded guilty to the crime of robbery in the first degree without even asking him if he were guilty or not, without even asking him if he wanted to withdraw his prior plea of not guilty and without the advice and effective assistance of competent counsel? Is such a trial by due process of law? In *Chambers* v. *Florida*, 309 U. S. 227, Mr. Justice Black when speaking about the procedural standards guaranteed by the Constitution said:

> "The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history. However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment—just as that in the Fifth—had led few to doubt that it was intended *to guarantee procedural standards*

adequate and appropriate, then and thereafter, to protect, at all times, people charged with crimes by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or the helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. . . . But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the law of the land evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment, for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power. Thus as assurance against ancient evils, our country, in order to preserve 'the blessings of liberty' wrote into its basic law the requirements among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow *if procedural safeguards have been obeyed.*" (Emphasis petitioner's.)

The statutes of New York are adequate and appropriate but to conform with the Constitution these 'procedural safeguards' must be obeyed. Their mandates must be obeyed by those on whom the duty is imposed and the record must show that fact. The right to be informed of the constitutional right to counsel and the effective assistance of counsel in a criminal prosecution is no mere formality. The proposition is too serious to permit those who have disregarded the statutes to later seek sanctuary in such doctrine as waiver or estoppel. All the rights written into the Constitution and statutes are as nothing if a defendant is without counsel when charged with a serious crime. The right to have the assistance of counsel, including the appointment of counsel when a defendant is unable to ob-

tain counsel, is the key which unlocks the door to all the other rights of the accused. In fact it is one fundamental right without which all the other rights become valueless, because they are unknown to the accused, or far beyond his powers to apply to his case or to even understand at all. Without counsel he may be deprived of all the other rights guaranteed him by the Constitution and laws of the state, or by the due process clause of the federal constitution, because he, especially in a case as the one at bar, is totally ignorant of their existence, or through sheer fear of asserting them against an overpowering or unscrupulous prosecuting attorney whose only ambition is to pile up a percentage of convictions greater than his predecessor. Without counsel, totally ignorant of his rights, this petitioner was induced to permit a court to order a plea of guilty entered against him on June 1st, 1931 to the infamous crime of robbery in the first degree, an offense which in various states is of a capital nature, and for which he was given a maximum term of imprisonment of thirty (30) years and could have been sent to prison under the laws then existing for his natural life. The decisions of this court in recent years disclose many instances of the loss of substantial rights by indigent defendants solely because they were not represented by competent counsel. In how many of these cases could the right have been effectively asserted, at the time or thereafter, by a defendant without the aid of counsel? In how many other instances does the accused, because of his ignorance, still without counsel, remain in the penitentiary without knowledge of his rights? Then when he does find out that he was convicted in violation of his constitutional rights only to be confronted by the prosecutor with the contention that he cannot have relief as there is a presumption based on the vague possibility he was accorded his rights, even in the face of the records of the county Court to the contrary. Even presumptions

created by statute have no such credible force (*Tot v. United States*, 63 S. Ct. 1241; Whigmore on Evidence, 3rd Ed., Sec. 2491, Vol. IX, p. 289; 20 Am. Jur. 170, Evidence, Sec. 166).

It is submitted, that even if the records of the Kings County Court showed a waiver of the right to counsel, it would still be a denial of the constitutional right to counsel as under the circumstances prevailing there could be no such intelligent and competent waiver as required by the law. An ignorant 19 year old boy without parents, penniless and friendless, charged with a crime of robbery in the first degree could not be deemed to have sufficient discretion to waive such a fundamental right. Why, such a boy is still in his infancy; he could not competently sign a ten dollar promissory note; he is precluded by his very incompetency to enter into a contract; but it is urged by the respondent he may consign himself to imprisonment for his natural life. But the records of the Kings County Court show no such waiver, they do however disclose every word spoken by the Court and the prosecutor, the entire discussion was between them as the defendant took no part in the proceedings, and no amount of ingenuity can read into this record anything that never existed. Justice Major in speaking of the rule of waiver in *United States v. Haupt, et al.*, 136 F. (2) 661, said:

> "It is argued by the government that the burden rested upon the defendants to establish that they did not competently and intelligently sign waivers of custody. The following cases were cited in support of this contention (cases cited). These cases all involve habeas corpus proceedings wherein the petitioners were seeking release from the penitentiary *because they waived a jury trial or the assistance of counsel.* The cases were decided, * * * on the theory *that the record of the court of conviction, showing such waiver*, was presumptively correct and that the burden

to *overcome the record* was on the one who asserted its invalidity. Here we have a different situation. * * * We think under such circumstances the burden was on the government to maintain its assertion. In Johnson v. Zerbst, 304 U. S. 458, 464, * * * the court said: "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights." Irrespective, however, as to which side carried the burden, *we must hold there is no satisfactory proof that the defendants knowingly waived any right and no proof as to the waivers signed by the defendants* * * *." (Emphasis petitioner's.)

Cooley, in his Constitutional Limitations, 8th Ed., page 371 says that "In criminal cases the doctrine that a constitutional privilege may be waived must be true to a very limited extent only."

Now, the records of the proceedings had against the petitioner in the Kings County Court are at this time all available and the statement of Mr. Siegel in his affidavit in answer to the original petition to the Kings County Court that "It is possible that during that time records which formerly existed have disappeared," is a gross misstatement. But these records reveal no waiver of either a trial by jury or of the assistance of counsel both which the constitution of this state guarantee. They disclose the fact that a 19 year old boy was brought into court and the clerk ordered to plead him guilty to the crime of robbery in the first degree. It is urged that this could not have happened if the petitioner had the advice of counsel. *The denial of counsel was the efficient cause for the denial of all the other rights including the right to be tried by jury.*

Point Third

The background of this petitioner which included ignorance, poverty, bewilderment, together with the legal disabilities and incompetency that attach to an infant when charged with a serious crime, subject on conviction to imprisonment for his natural life, preclude a competent and intelligent waiver of the constitutional right to the assistance of counsel on his arraignment in the County Court of Kings County on June 1st, 1931.

Before any right can be waived the person must know of its existence. "A waiver may be defined as the intentional relinquishment of a known right with both knowledge of its existence and the intention to relinquish it" (*Watkins* v. *Fly*, 136 F. (2) 578). In this consideration we deal with the circumstances, background, competency and intelligence of this petitioner at the time of his arraignment on June 1st, 1931 when the court ordered entered against him a plea of guilty to the crime of robbery in the first degree. Now, assuming, *arguendo*, as the respondent says in his brief, that the record did reveal a waiver it would have to be decided was that a competent and intelligent waiver. How that would be determined, and the factors relied on to arrive at the determination has been well settled by the courts. In *Johnson* v. *Zerbst*, 304 U. S. 458, at page 464 in respect to waiver it was said:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right of counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

The background of this petitioner at the time of his arraignment in the Kings County Court on June 1st, 1931,

conspicuously reveals an ignorant boy of 19 years old without parents, poverty-stricken, friendless, incompetent, together with all the disabilities that legally attach to an infant in court actions. Such a background forecloses any reasonable argument contending that he "competently and intelligently" waived his right to counsel. In *Glasser* v. *United States*, 315 U. S. 60, Mr. Justice Murphy in writing the opinion for the court said:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights * * *. Glasser never affirmatively waived the objection he initially advanced when the trial court suggested the appointment of Stewart. We are told that since Glasser was an experienced attorney he tacitly acquiesced in Stewart's appointment because he failed to renew vigorously his objections at the instant the appointment was made. The fact that Glasser is an attorney is, of course, immaterial to the consideration of his right to the protection of the Sixth Amendment. *His professional experience may be a factor in determining whether he actually waived his right to the assistance of counsel.* * * * But it is by no means conclusive." Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused, Mr. Justice Sutherland said that such a duty "is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and *with a caution increasing in degree as the offences dealt with increase in gravity.*" Patton v. United States, 281 U. S. 276. The trial court should protect the right of an accused to have the assistance of counsel." (Emphasis petitioner's.)

We may at this moment indulge in a glance at the background of Glasser. He was an attorney, a former United

States Attorney for the Northern District of Illinois. Well educated in the history of jurisprudence and experienced in all modes of court procedure in criminal actions; well informed in both his statutory and constitutional rights and as to the gravity of the offence of which he was charged, a glance at the punishment imposed determines that factor. He was sentenced to imprisonment for fourteen (14) months. Notwithstanding these factors the court said:

> "We indulge every reasonable presumption against waiver of fundamental rights."

For comparison let us glance at the situation of the petitioner in the instant case and observe the gulf between him and Glasser. An ignorant 19-year-old boy. Without friends or parents to offer him help or advice; without money and without counsel. An infant under the laws of every State in the Union and subject to all the legal disabilities and incompetency accorded by the law of a minor. Even a minor named as a codefendant, but for whom no guardian ad litem was appointed, could not be subject to an adverse judgment in a civil suit. (*Grego v. Demanio*, 231 N. Y. S. 130). A deed attempting to convey property of infants pursuant to a court order, without proper notice and without appointment of guardian ad litem would be void; and an infant may repudiate an entire contract because he is deemed by the law *incompetent* to make one (*Anthony v. Syracuse University*, 224 A. D. 487). While it is here conceded that the rights of infants rate no superiority over those of adults, while the latter must in most cases protect their own rights, the rights of infants are of greater concern to the court because of their *incompetency*. He cannot be sued in civil actions to establish titles without appointment of guardian ad litem. He is not considered to have sufficient discretion to adequately enforce and protect his rights, and hence he is prohibited from prosecuting or defending his

civil suits alone. A court would acquire no jurisdiction over him, a defendant, where summons, though personally served on him, was not served on the parent. (*Ward* v. *Ward*, 242 N. Y. S. 171.) Only when he becomes of age may he be entitled to the control and management of his defense in a civil suit, and even there he may be "allowed to appear and defend in person and with counsel" (Const. of New York, Art. 1, sec. 6). It is not suggested that infancy is a defense for the commission of a crime, but merely to illustrate that minority of itself shows *incompetency*. All the foregoing disabilities attached this petitioner when he made his appearance on arraignment in the Kings County Court in the instant case, and the situation was further aggravated to his disadvantage by the fact that he was penniless. As to the gravity of the offence of which he was charged: he was subject to life imprisonment. Surely it cannot be contended with reason that under such circumstances he was capable of "competently and intelligently" dispensing with the most sacred of fundamental rights, a right even now scrupulously accorded the Geramn war criminals, the right to the "Assistance of Counsel," or that the presumption exists that infants brought up in ignorance known of its existence and must demand it in a criminal prosecution. Is it demanded of such a minor that he inherently possesses the degree of perfection which Kipling, in his "If," set forth as some of the necessary attributes of a man, when he said:

"If you can keep your head when all about you
Are losing theirs and blaming it on you:
If you can trust yourself when all men doubt you,
But make allowance for their doubting, too,

* * * * * * *

"If you can bear to hear the truth you've spoken,
Twisted * * * to make a trap for fools,

* * * * * * *

"If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you,

* * * * * * *

* * * You'll be a man, my son."

We know this Court does not think so, all their decisions are to the contrary. In the days of the tyrant there may have been precedents against us but those days are gone forever. Mr. Henry Grattan, on Moving for a Declaration of Irish Right on April 19, 1780, in referring to such precedents said:

> "That there are precedents against us, I allow; acts of power I would call them, not precedents; and I answer the English pleading such precedents, as they answered their Kings when they urged precedents against the liberty of England. Such things are the tyranny on one side, the weakness of the other, and the *law* of neither. We will not be bound by them; or rather, in the words of the Declaration of Right, no doing, judgment, or proceeding to the contrary shall be brought into precedent or example. Do not, then, tolerate a power, the power of the British government, over this land, which has no foundation in necessity, or utility, or empire, or the laws of England, or the laws of Ireland, or the laws of nature, or the laws of God."

It is urged here that the circumstances and facts existing in the case of petitioner at the time of his arraignment in the instant case, and where the terrible sentence was pronounced upon him for a crime to which he never voluntarily or actually pleaded guilty simply emphasizes the need for counsel. It is submitted that under all the circumstances of which this Court must judicially notice, no competent and intelligent waiver could have been executed as the petitioner at that time was neither competent nor intelligent as

far as the knowledge of his constitutional rights were concerned. To urge this Court to presume such a waiver is unreasonable, absurd, even ridiculous.

In the light of the analogy made in this point between the petitioner's and Glasser it is appropriate to quote the words of Lord Chatam in the case of Wilkes' before the House of Lords on January 8, 1770:

> "They did not say, these are the rights of the great barons, or these are the rights of the great prelates. No, my Lords, they said in the simple latin of the times, '*nullis liber homo*', and provided as carefully for the meanest subject as for the greatest. These are uncouth words, and sound but poorly in the ears of scholars; neither are they addressed to the criticism of scholars, but to the hearts of free men. These three words, '*nullis liber homo*', have a meaning which interests us all. They deserve to be remembered—they deserve to be inculcated in the minds—they are worth all the classics. Let us not, then degenerate from the glorious example of our ancestors, * * * A breach has been made in the Constitution—the battlements are dismantled—the citadel is open to the first invader—the walls totter—the Constitution is not tenable—What remains, then, but for us to stand foremost in the breach and repair it, or perish in it?"
>
> * * * * * * *
>
> "In his person, though he were the *worst* of men, I contend for the safety and security of the best. God forbid, my Lords, that there should be a power in this country of measuring the civil rights of the subject by his moral character, or by any other rule but the fixed laws of the land!"

In *Powell* v. *Alabama*, 287 U. S. 45, in a passage whose authority later decisions, even to *Rice* v. *Olsen*, *supra*, have strengthened rather than weakened, it was said:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by

counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted on incompetent evidence, or evidence irrelevant to the issues or otherwise inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant or illiterate, of those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, * * *. It reasonably may not not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

POINT FOURTH

The adversary nature of the American Judicial Process in criminal prosecutions which has emerged from the common law requires that all persons charged with serious crimes need the assistance of counsel at all stages of the proceedings. These requirements are no more dispensable than are the services and duties of the attorney for the State and only on very rare occasions may they be waived; but never in cases under the circumstances here.

The very adversary nature of the Anglo-American judicial process make the right to the assistance of counsel of great importance to one charged with a serious crime. In it is ingrained all the elements of competitive capitalism. If it were an investigative system, the right to counsel would be

relatively insignificant and unimportant, as the court would be charged with the affirmative duty of initiating an inquiry to ascertain the facts, without and dependence on the adequacy of the presentation by the prosecutor for the state or the attorney for the defense. But the adversary system of jurisprudence which emerged from the common law and the spirit of Montesquieu (L'Esprit des lois.) is of a very different character. The very inherent nature of the process demands that one charged with crime needs counsel in the same manner and to the same extent as a sick person requires the services of a physician. Under the adversary system law is recognized as one of the learned professions with all empiricism outlawed by statute, and the idea of "every man his own lawyer has been shown by all experience to be an illusion." (Roscoe Pound, The Administration of Justice in the Modern City. 26 Harv. L. Rev. 302, 319.) A criminal trial is in essence a contest, and as in all contests, the greatest advantage rests with the party most familiar with the rules and the knowledge of the pitfalls that may be encountered, and the barricades that may be erected. The theory of the adversary system has always been that justice will emerge, but this theory is predicated on one essential ingredient: that not one, but both parties will have a working knowledge of the rules. Many a man has forfeited his liberty and property on the absence of a single word on the record: EXCEPTION.

In the field of criminal law, where the stakes in the game are the life and liberty of a human being on one hand, and the ambition of an assistant state prosecutor on the other, additional factors, which have frequently been the subject of comment by this Court, must be taken into consideration.

1. That aside from the conniving and scheming type of criminal, who in most cases is adequately defended by high-powered counsel, generally paid for by the proceeds

of his loot, most persons accused of crime are people of little intelligence or education and meager financial resources (Glueck, Criminal Careers Retrospect, 1943, 5, 6; Dwight McCarthy, Mental Defectives and the Criminal Law, 14 Iowa L. Rev. 401, 416 (1929); Stearns, Medical and Social Factors in Crime, 18 Ind. L. J. 283, 288 (1943)). They are thus at an increased disadvantage due to their lack of personal ability and of funds with which to engage competent counsel. (Based on extensive study of crime and criminals, Professor Sheldon Glueck has concluded that the furnishing of counsel to poor persons accused of crime is a crying need. Crime and Justice, 1936, 241.) No case has come before this court where an accused needed counsel more desperately than did this petitioner in the Kings County Court on June 1st, 1931.

2. Prosecuting attorneys, whose efficiency is determined by the percentage of the convictions they submit to the Legislature each year, are more interested in obtaining these convictions than in seeing that justice is done. The need for getting results puts pressure upon them to use unethical tactics and strategy and in some cases "third degree," to suppress evidence, to extort confessions, to bulldoze witnesses, and generally to indulge in that lawless enforcement of law which produces a vicious circle of contempt for law (Roscoe Pound, Criminal Justice in America, 1930, 186; Glueck, Crime and Justice, 1936, 35, 65). They have a direct personal interest in obtaining a conviction. But in no case can the petitioner discover where the interest was so personal that the court and prosecutor denied an accused counsel so that they might arbitrarily assume the responsibility to plead a penniless 19 year old infant guilty of a crime whereby he would have to endure imprisonment for a maximum term of thirty years, and as a vindication of their acts pray to this court to sustain

the contention that because petitioner had been arrested for juvenile delinquency he was adequately qualified to protect his constitutional rights without counsel. Other than this case none has yet been discovered in recent years.

3. To the poor, the unfortunate, the ignorant, the judgment of the County Court is the final end of the proceedings, but to the other category above mentioned the final judgment of the County Court is just the basis for a long line of litigation to Appellate Courts (Chief Justice Mitchell in Motions and Rules, 2nd Ed. 1906, 124).

The highest court in this nation has on many occasions commented upon the factors above outlined. It is not on conjecture that they are here presented. They only stress with greater force the vital importance of counsel to a defendant in a criminal prosecution. Unlawful and tyrannical methods of procuring convictions have been demonstrated as stark realism and it is not necessary to go back to the dark middle ages to uncover them. Deliberate deception may be practiced upon a court by the presentation of testimony known to be perjured (*Mooney* v. *Holohan*, 294 U. S. 103; *Pyle* v. *Kansas*, 317 U. S. 213; *People of New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Herbert* v. *Louisiana*, 47 S. Ct. 103). Confessions may be introduced by state officers with the connivance of assistant district attorneys that have been extorted by fear or procured by other unlawful means (*Malinski* v. *New York*, 324 U. S. ——; *Brown* v. *Mississippi*, 297 U. S. 278; *Ashcraft* v. *Tennessee*, 64 S. Ct. 921). Pleas of guilty may be elicited by fraud and misrepresentation (*Lyons* v. *Goldstein*, 290 N. Y. 19; *Smith* v. *O'Grady*, 312 U. S. 329; *Ex Parte Sharp*, 33 F. Supp. 464; *Chambers* v. *Florida*, 309 U. S. 227; *State* v. *Paglianch*, 252 P. 177; *Rhodes* v. *State*, 156 N. E. 389). Innocent men may be the victims of "educated identifications" procurred by zealous private detectives and state

agents (*People* v. *Campbell*, Court of General Sessions, April, 1937; Convicting the Innocent, 1932, by Borchard).

It is in the recognition of these obvious truths that this court stated an accused required the "*guiding hand of counsel at every step in the proceedings against him*" (*Powell* v. *Alabama*, 287 U. S. 45). In *Smith* v. *O'Grady*, 312 U. S. 329, there has appeared from the record the "*picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him*, and inveigled by false statements of state law enforcement officers into entering a plea of guilty . . . Rushed to the penitentiary where his ignorance, confinement and poverty had precluded the possibility of his securing counsel in order to challenge the procedure by regular processes of appeal." We have here a more aggravated set of circumstances. This petitioner was not even accorded the right to plead guilty; *he was pleaded guilty by the order of the court and the district attorney;* he had nothing to say in the matter; and he was, on that plea, sentenced to imprisonment in state prison for thirty years. These statements are not the result of mere allegations in the verified petition to this court; they are substantially consistent with the stenographic minutes of the Kings County Court taken by Mr. Ralph Roberts, the official court stenographer of June 1st, 1931. The petitioner submits that these things could not have happened had counsel been assigned; even assigned counsel could not plead him guilty (Code of Criminal Procedure, section 335). But they conclusively demonstrate the dire need for the assignment of counsel to a defendant too poor to engage his own counsel when he is charged with crime, and therefore give substance to the constitutional provisions and statutory mandates that are applicable for the requirements of the poor and ignorant as well as the rich and educated. It was in the recognition of this principle that the guarantee of the right to counsel contained in the

state and federal constitutions was to protect an accused from a conviction resulting from his own ignorance. In *Johnson* v. *Zerbst*, 304 U. S. 458, this court said:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyers—to the untrained layman—may appear complex, intricate and mysterious."

And this petitioner at the time of his arraignment was not even the average layman, he was a penniless 19 year old boy with no education or friends who might engage counsel to aid him in his terrible predicament. In *Adams* v. *United States*, 317 U. S. 269, where the defendant was a person of good education, and had previously conducted civil litigation all the way to this court, the importance of this was reasserted:

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have the time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in Court."

These realistic truths do not become less evident because the trial takes place in a state rather than a Federal Court. The laws of the state are not less intricate; the accused is no more educated or intelligent and possesses no greater

skill; the prosecutor is no less partisan, in fact, in most cases, more partisan on account of local prejudice and a greater opportunity to exploit his efficiency in obtaining convictions; and the court is no more able, under governing rules to conduct the defense for the accused nor to make an independent inquiry to ensure that Justice is done. All these elements inherently evolve from the adversary system of jurisprudence. Mr. Earl T. Crawford of the Missouri Bar hit the matter squarely when he said:

> "Under such circumstances, where the prosecuting attorney is seeking to add another feather to his cap or to make an example of some offender, a poor ignorant person, particularly where weakly defended by an incompetent attorney, may be and often is heavily dealt with regardless of his offence. The safeguards of our criminal procedure were originally designed to protect the lowly against the great power of a royal government. And it would seem that such safeguards are as necessary today as ever; perhaps more so in order to protect our people from the ever increasing power of the state, especially so long as the attorneys for the state seek convictions for their own personal advancement and assume the position of a partisan advocate instead of simply standing between the people and the accused. The incorporation into our criminal jurisdiction of a public defender would tend to obviate the 'almighty' position now occupied by the prosecuting attorney in the minds of many." The Prosecuting Attorney's Attitude. 5. Mo. Bar. Journal 138, (1934).

See also Benjamin V. Cohen and Erwin L. Griswald in the Denial of Counsel to Indigent Defendants, New York Times, August 2, 1942, IV, 6:5. "The right to counsel, for the poor as well as the rich, is an indispensable safeguard of freedom and justice under our law."

It is submitted in this consideration that the factors here discussed were elements influential in depriving the peti-

tioner of his liberty without due process of law in violation of the Constitution of the United States, and that the same or similar elements are now present in the efforts to prolong the illegal confinement of the petitioner. This court said in *Williams* v. *Kaiser*, 323 U. S. 471:

> "Only counsel could discern from the facts whether a plea of not guilty to the offence charged or a plea of guilty to a lesser offence would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the courtroom. *He needs the aid of counsel lest he be the victim of overly-zealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment. "These are reasons why the right to counsel is fundamental."* Powell v. Alabama, supra; 287 U. S. at page 70, 53 S. Ct. at page 64; Grosjean v. American Press Co., 297 U. S. 233, 243, 244, 56 S. Ct. 444, 447; Avery v. Alabama, 308 U. S. 444, 447, 60 S. Ct. 321, 322. They indicate the protection which the individual needs when charged with crime. Prompt and expeditious detection and punishment of crime are necessary for the protection of society. But that may not be done at the expense of the civil rights of the citizen. Law enforcement need not be inefficient when accomodated to the constitutional guarantees of the individual."

And the same eminent authority, Mr. Earl T. Crawford, quoting the words of Mr. Samuel Untermyer, 5 Mo. Bar Jour., also says:

> "The modern attorney does not stand between the people and the accused. He and his assistants too often measure success of their labor by the number of convictions they have secured. It is false and brutal conception of duty that is responsible for grave injustice, *but it is nonetheless true that it exists.* Under its influence, the prosecuting attorney becomes a partisan advocate, blind to the strength of the defense, unwilling to voluntarily expose the weakness of the people's case." (Emphasis petitioner's.)

It is no defense for the respondent to assert that this petitioner was guilty of the charges in the indictment. Assuming even that the petitioner knew he was guilty of a crime, he could not know whether, under the applicable statutes and court decisions, that it was robbery in the first degree, or any lesser degree, grand larceny or petty larceny. "Only counsel could discern from the facts" what the crime was. And even if the petitioner were guilty of robbery in the first degree, that could have no influence here for it is not the question that must be decided. His right to counsel must be determined not only as of that time, *but in the light of the fact that on his arraignment in the Kings County Court on June 1, 1931 he was presumed to be innocent.* The question before this court, is not whether the failure to assign counsel did petitioner any harm, but whether he has been deprived of a right or rights guaranteed him by the federal and state Constitutions, so as to render the plea of guilty ordered entered by the court against and all subsequent proceedings void. In *Glasser v. United States*, 315 U. S. 60, 75-76, this court said:

> "To determine the precise degree of prejudice sustained by Glasser as result of the Court's appointment of Stewart as counsel for Kretske is at once difficult and unecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

In *Snyder* v. *Massachusetts*, 291 U. S. 97, 136, 137, Mr. Justice Roberts, dissenting, said:

> "The respondent urges that whatever may have been the petitioner's right, the record demonstrates he could have suffered no harm by reason of his absence, * * * But if it were clear that the verdict was not affected by the knowledge gained on the view or that the result would have been the same had the appellant

been present, still the denial of his constitutional right ought not be condoned. Nor ought this court to convert the inquiry from one as to the denial of the right into one as to the prejudice suffered by the denial. To pivot affirmance on the question on the amount of harm done the accused, is to beg the constitutional question involved. The very substance of the defendant's right is to be present. By hypothesis it is unfair to exclude him."

These safeguards by Constitutional provisions and legislative enactments are placed about a defendant to be accorded him by prosecuting officers and courts, and the defendant cannot be deprived of them with impunity. In the *Snyder* case the court said at page 105:

"What may not be taken away (consistent with due process) is notice of the charge and an adequate opportunity to be heard in defense of it."

But too frequently an accused cannot have adequate opportunity to be heard in his own defense, if he is without counsel. He does not know the rules. He does not even know that he is entitled to notice of the charge; and if he received notice he cannot determine its sufficiency. Men put in years of their life in learning these things; as said before, *the law is a profession.* It is compulsory under the system of jurisprudence that exists in this nation that it remain a profession while men are governed by laws; while laws are the means by which violations are determined, while the violations themselves are the deviation of laws, the right to counsel and to the effective assistance of counsel one of the most fundamental of all the guarantees of a free people. It is urged here, under the facts and circumstances surrounding the arraignment and plea of this petitioner, that if the Constitution of New York was silent on the

proposition, and that no statute could be found on the subject, the right to "Assistance of Counsel" in a criminal prosecution of a person governed by laws would be a fundamental right, and its denial would be a lawless and palpable violation of the Fourteenth Amendment of the Constitution of the United States. This question is discussed more fully in the consideration following, point fifth. We will conclude this point with a passage by Lord Erskine, in behalf of Thomas Hardy delivered before the Court of King's Bench, November 1, 1794:

> "In times when the whole habitable earth is in a state of change and fluctuation—when deserts are starting up into civilized empires around you; and when men, no longer salves to the prejudices of particular countries, much less to the abuses of particular governments, enlist themselves, like the citizens of an enlightened world, into whatever communities their civil liberties may be best protected—it never can be for the advantage of this country to prove that the strict, unextended letter of her laws is no security to its inhabitants. On the contrary, when so dangerous a lure is every where held out to emigration, it will be found to be the wisest policy of Great Britain to set up her happy Constitution—the strict letter of her guardian laws, and the proud condition of equal freedom, which her highest and her lowest subjects ought equally to enjoy—it will be her wisest policy to set up these first of human blessings against those charms of change and novelty which the varying condition of the world is hourly displaying, and which may deeply affect the population and prosperity of our country. In times when the subordination to authority is said to be every where but little felt, it will be found to be the wisest policy of Great Britain to instill into the governed an almost superstitious reverence for the strict security of the laws; which, from their equality of principle, beget no jealousies or discontent; which, from their equal ad-

ministration, can seldom work injustice; and which, from the reverence growing out of their mildness and antiquity, acquire a stability in the habits and affections of men far beyond the force of civil obligation —whereas, severe penalties and arbitrary construction of laws intended for security, lay the foundations of alienation from every human government, and have been the cause of all the calamities that have come, and are coming upon the earth."

Point Fifth

The right to counsel, and the right to the effective assistance of counsel in a criminal prosecution as guaranteed by the Sixth Amendment is so fundamental that the due process clause in the Fourteenth must protect it against State denial. The history of jurisprudence proves beyond all reasonable doubt that without the right to counsel all the other fundamental rights of an accused are as nothing under the facts and circumstances discussed in the instant case.

1. The right to counsel and the right to the effective assistance of counsel under the circumstances here is a fundamental right guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States.

This court has already held that the right to counsel, and the right to the effective assistance of counsel, when counsel has been assigned, which the Sixth Amendment also guarantees, was so fundamental that it was a necessary ingredient in due process of law. In *Avery* v. *Alabama*, 308, U. S. 444, this Court said:

> "The sole question presented is whether in violation of the Fourteenth Amendment 'petitioner was denied the right to counsel, with the accustomed incidents of consultation and opportunity of preparation for trial,'

because after competent counsel was duly appointed their motion for continuance was denied. Vigilant concern for the maintenance of the constitutional right of an accused to assistance of counsel led us to grant certiorari.

"Had petitioner been denied any representation of counsel at all, such a clear violation of the *Fourteenth Amendment's guaranty of assistance of counsel would have required reversal of his conviction.* But counsel was duly appointed for petitioner by the trial court as required by both Alabama law *and the Fourteenth Amendment.* * * * But the denial of opportunity for appointed counsel to confer, to consult with the accused and prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the *Constitutional requirement* that an accused be given the assistance of counsel. *The Constitution's guaranty of counsel* cannot be satisfied by a mere formal appointment. (Italics petitioner's)

In *Powell* v. *Alabama*, 287 U. S. 45, this Court held that the failure to make an effective appointment of counsel was a denial of due process, "whether this would be so in other criminal cases or under other circumstances, we need not now determine". The question under discussion was whether the right involved was "of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," and that if a right were of such a nature it was included in the due process of law. We believe that in the foregoing points it can be conclusively held that the right to counsel is of such a nature, because without the right to counsel and the effective assistance of counsel all the other fundamental rights are as nothing. In *Powell* v. *Alabama*, at page 73 it was said:

"The United States by statute and every state in the Union by express provision of law, or by the deter-

> mination of its courts, make it the duty of the trial judge, where the accused is unable to employ counsel, to appoint counsel for him. In most states the rule applies broadly to all criminal prosecutions, in others it is limited to the more serious crimes, and in a very limited number, to capital cases. A rule adopted with such unanimous accord reflects, if it does not establish, the inherent right to have counsel appointed at least in cases like the present, and lends convincing support to the conclusion we have reached as to the fundamental nature of that right."

The Court limited its holding at that time to the facts of that particular case, and we deem it unnecessary to again repeat the facts and circumstances of the instant case of your petitioner, but its views upon the broader question seemed conspiciously clear. The opinion in that case was written by Mr. Justice Sutherland who four years later wrote the opinion in *Grosjean* v. *American Press Company*, 297 U. S. 233, where a unanimous court said that in *Powell* v. *Alabama*:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action, *by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution.*"

Then again four more years later (1940) in *Avery* v. *Alabama, supra,* it was said:

> "Consistently with the preservation of constitutional balance between State and Federal sovereignty, this court must respect and is reluctant to interfere with the States' determination of local social policy. *But where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands*

that we scrupulously review the record. (Italics petitioner's)

And the statement of Mr. Justice Cardozo in *Palko* v. *Connecticut* (1937), 302 U. S. 319, that in *Powell* v. *Alabama*, the right to counsel had "*been found to be implicit in the concept of ordered liberty*" was essentially true. See John Raeburn Green, Liberty Under the Fourteenth Amendment, 1942 27 Washington University Law Quarterly, 479, 529, 530, 531. In *Johnson* v. *Zerbst, supra*, this Court said that the right to the assistance of counsel was "one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." These factors of this essential requirement of due process has always been recognized, the provision was even submitted by the First Congress as one of "the essential barriers against arbitrary or unjust deprivation of human rights." In other words it has never been recognized as a mere formality but a fundamental prerogative of the most sacred character. It is the right of rights without which all other rights are as nothing because they are unknown to the average layman. The framers of the Bill of Rights and the Constitution were fully aware that the most common and most effective mechanism for persecution and for the deprivation of the First Amendment freedoms was a criminal prosecution. It has always been so, since and before the trial of Jesus. History is full of it, it proved it then and it has remained true to this date and the decisions of this Court dealing with human liberty prove conclusively that it is still fully realized (*Chambers* v. *Florida*, 309 U. S. 227). And as was said by Mr. Justice Black in *Feldman* v. *United States*, 64 S. Ct. 1082:

"The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion,

speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge.

"But these men were not satisfied that the First Amendment would make this right sufficiently secure. As they well knew, history teaches that attempted exercises of the freedoms of religion, speech, press, and assembly have been the commonest occasions for oppression and persecution. Inevitably such persecutions have involved secret arrests, unlawful detentions, forced confessions, secret trials, and arbitrary punishments under oppressive laws. Therefore it is not surprising that the men behind the First Amendment insisted upon the Fifth, Sixth, and Eighth Amendments, designed to protect all individuals against arbitrary punishment by definite procedural provisions guaranteeing fair public trials by juries. They sought by these provisions to assure that no individual could be punished except according to 'due process,' by which they certainly intended that no person could be punished except for a violation of definite and validly enacted laws of the land, *and after a trial conducted in accordance with the specific procedural safeguards written in the Bill of Rights.* If occasionally these safeguards worked to the advantage of an ordinary criminal, that was a price they were willing to pay for the freedom they cherished." (Italics petitioner's.)

2. The factors by which this court distinquished *Betts* v. *Brady*, 316 U. S. 455 from *Powell* v. *Alabama*, 287 U. S. 45 are totally absent in this case.

In *Powell* v. *Alabama*, it was decided where a defendant is unable to employ counsel; and incapable adequately of making his own defense because of ignorance or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. The factors that compel this assignment are appropriately outlined in this brief. But as the respondent relies on the narrow and carefully limited holding made by this court in *Betts* v. *Brady*, it is necessary to draw some analogy at this time between that case and petitioner's. On page 12 of the respondent's brief in opposition to the granting of the writ it is found:

> "If we apply the standard adopted by this court in *Betts* v. *Brady*, to the circumstances surrounding the arraignment and conviction (by his own plea of guilty) of the petitioner, there is evident, nay obvious, a striking similarity in the cases. The petitioner was no mere youth, innocent of the crime of which he was charged, ignorant of the rules of law, and bewildered by the formality of courts and court procedures."

It is interesting that the respondent inserts in the statement above "(by his own plea of guilty)" he would be more correct if he stated "by the plea of guilty arbitrary ordered by the court." That would be a statement substantiated by the records. He then goes on to prove that a previous arrest for juvenile delinquency fully qualified the petitioner in "the rules of law" and the "formality of courts and court procedure." The following comparison is what is deemed as "striking similarity in the cases."

Betts v. *Brady*	*Canizio* v. *New York*
"the accused was not helpless, but a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. * * * if, the situation had been otherwise, and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction." *Coates* v. *State*, Court of Appeals of Maryland; decided April 22, 1942.	The petitioner was a 19 year old infant, with no education, no parents, no money to employ counsel, under all the disabilities that attach to an infant under the law, had never before been convicted for any offence, was wholly unfamiliar with court procedure, was never informed of the nature of the charges against him; was never asked if he wanted to stand trial or plead not guilty, or withdraw his former plea of not guilty and plead guilty or nolle contendre, but was without his consent or consultation, pleaded guilty to the crime of robbery in the first degree.
He was sentenced to a maximum term of imprisonment of eight years.	He was sentenced to a maximum term of imprisonment of thirty years.
The Constitution and statutes of Maryland *do not* provide for the assistance of counsel under the circumstances.	The Constitution and statutes of New York *mandatorily provide* for the assistance of counsel under the circumstances and places the duty of assigning counsel on the court. (Const. N. Y. Art. 1, sec. 6; Code of Criminal Procedure, secs., 8, 188, 308, 309.)

In *Betts* v. *Brady*, the court distinguished that case from *Powell* v. *Alabama*, by the fact that in the *Bett's* case no provision of the Constitution or statutes of Maryland re-

quired the appointment of counsel, whereas in the earlier case an Alabama statute did require it. Referring to *Powell* v. *Alabama*, this court said:

> "This occurred in a State whose statute law required the appointment of counsel for indigent defendants prosecuted for the offence charged. Thus the trial was conducted in disregard of every principle of fairness and in disregard of that which was declared by the law of the State a requisite of a fair trial."

The difference of the legislative policy of the two states was relied on as the principle ground for distinguishing the two cases. Therefore, the petition in the instant case must be considered in the light of the New York statutes which is "declared by the law of the State a requisite of a fair trial." Section 188 of the New York Code of Criminal Procedure provides that:

> "When the defendant is brought before a Magistrate upon arrest either with or without warrant on a charge of having committed a crime, the Magistrate must immediately inform him of the charge against him, *and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.*"

Again the question is further reinforced by section 308 of the same Code which states in part:

> "That if an accused appear on arraignment without counsel, he must be asked if he desire counsel, and if he does, the court must assign counsel."

These statutes are not, like the statutes of Maryland, limited to any particular grade of offence, but are extended broadly to all kinds of crimes, especially infamous crimes. It will be conceded here, as in *Powell* v. *Alabama*, this court is powerless to interfere with the interpretation of state

statutes by a state court; but here, as there, this Court must take into account the legislative policy of a state in determining whether the conviction violated the due process clause of the Fourteenth Amendment. Here, as in *Powell* v. *Alabama*, and as in *Williams* v. *Kaiser*, 1945, 323 U. S. 471, the denial occurred in a state whose legislative policy mandatorily required the appointment of counsel for indigent defendants prosecuted for the offence charged. (See *People* v. *McLaughlin*, 291 N. Y. 480; *People, ex rel. Moore* v. *Hunt*, 258 App. Div. 24.) Even a cursory examination of the facts in *Betts* v. *Brady* in comparison with those of the petitioner, and an examination of the laws applicable to the two cases compel a conclusion that no similarity exists, and that the contention to the contrary made by the respondent is without merit.

3. The rule announced in *Betts* v. *Brady*, is not consistent with the American concepts of the procedural standards requisite to a fair trial by due process of law as guaranteed by the Fourteenth Amendment. That case should be re-examined.

It is urged here that, this court having established beyond all reasonable question that the First Amendment freedoms are protected against state denial, it is now imperative, in order to make their protection not subject to impairment or abridgement and to afford an equally effective protection for the fundamental rights of an accused in a criminal prosecution.

When the fundamentality of constitutional rights is under discussion, the right to counsel in a criminal trial must not be excluded, because this right is not merely one of these rights; it is the key by which they are all protected. This right is infinitely more important to an accused, in danger of losing his life or liberty, than any other freedom or right guaranteed him by the Bill of Rights. The right to

the assistance of counsel is the right that protects all the other fundamental rights from being abridged or impaired. Two years after *Powell* v. *Alabama*, the Court in *Snyder* v. *Massachusetts*, 291 U. S. 97, dealt inconclusively with another right guaranteed by the Sixth Amendment, the right of an accused to be confronted with the witnesses against him. In *Brown* v. *Mississippi*, 297 U. S. 278, it reversed a conviction which rested upon a confession extorted by brutality and violence, holding that the use of such confession was a denial of due process. Recently it reversed the conviction on the same proposition in *Malinski* v. *New York*, 324 U. S. ——, where the police department aided by the assistant district attorney extorted a confession by unlawful means. The decisions in all these cases are not far removed, if removed at all, from the privilege against self-incrimination which is guaranteed by the Fifth Amendment. It is here submitted, that all the fundamental rights of free speech, free press, fair trials, and in general that criminal trials must be conducted with fundamental fairness essential to the very concept of justice is impossible except it be recognized that the right to counsel is the paramount right by which they can be all protected.

As is pointed out by Mr. Green in Liberty Under The Fourteenth Amendment, 27 Wash. U. L. Q. 497 at page 533:

> "But the due process clause of the Fourteenth Amendment, as the Court has now established, goes beyond Madison's amendment, and the ultimate limits of liberty and due process have not yet been determined. It is now apparent that the Court is working out, laboriously and piece-meal, its own bill of rights for criminal prosecutions; for Mr. Justice Roberts' rule must inevitably become in time a code of well-defined prohibitions against state action, instead of a general requirement of a "fair trial." And it seems highly desirable that this crystallizing process should be accelerated as much as possible."

It is because of the inclusion of the foregoing rights discussed, as a part of the due process, that the case of *Betts* v. *Brady*, should be examined again and the substantially limited scope of the right to counsel as announced in that case overruled. Mr. Benjamin V. Cohen and Professor Erwin N. Griswald, in their criticism of that case concluded as follows:

> "Most American lawyers and laymen alike before the decision in *Betts* v. *Brady* would have thought that the right of the accused to counsel in a serious criminal case was unquestionably a part of our Bill of Rights. Certainly the majority of the Supreme Court which rendered the decision in *Betts* v. *Brady* would not wish their decision to be used to discredit the significance of that right and the importance of its observance. "Yet at a critical period in world history, *Betts* v. *Brady* dangerously tilts the scales against the safeguarding of one of the most precious rights of man. For in a free world no man should be condemned to penal servitude for years without having the right of counsel to defend him. The right to counsel, for the poor as well as for the rich, is an indispensable safeguard of freedom and justice under our law." (Denial of counsel to Indigent Defendants" N. Y. Times, August 2, 1942, IV, 6, 5.)

For other adverse criticism of *Betts* v. *Brady*, see: Lusky, Minority Rights and the Public Interest, 52 Yale Law Jour. 1, 28, 30; Lashly and Rava, The Supreme Court Dissents, 28 Wash. U. L. Q. 191, 204, 205; 21 Chicago-Kent L. Rev. 107; 42 Col. L. Rev. 1205; 11 Geo. Wash. L. Rev. 354; 31 Ill. Bar Jour. 139; 27 Marquette L. Rev. 34; 16 So. Cal. L. Rev. 55; 91 Un. of Pa. L. Rev. 78; 17 Tulane L. Rev. 306.

This court has held in *Smith* v. *Allwright*, 321 U. S. 649, that:

> "In reaching this conclusion we are not unmindful of the desirability of continuity of decisions in constitu-

tional questions. However, when convinced of former error, this court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself."

This court should have no hesitation in applying this rule to a constitutional determination which is supported by but one decision, which violently interrupted, if not a continuity of decisions, at least a continuous current of thought to the contrary, expressed and re-expressed by the court on various occasions. *Powell* v. *Alabama*, gave the right to counsel more vitality than it ever had had before, because the right to counsel as guaranteed by the Sixth Amendment is so fundamental that the due process clause must protect it against state denial. This is so because the protection against state denial which has been given to the First Amendment freedoms by their inclusion within the due process clause is incomplete and will be ineffective unless the right to counsel by an accused, and the right to affective assistance of counsel are also protected against state denial.

Because of the foregoing the case of *Betts* v. *Brady* should be overruled as it does not conform with the concepts of American justice.

Conclusion

The order of the Kings County Court should be reversed, and the judgment of conviction rendered against petitioner

of June 19, 1931, ordered vacated and expunged from the records of the Kings County Court.

Respectfully submitted,

FRANK CANIZIO,
Petitioner-in-person,
135 State Street,
Auburn, New York.

Dated October 27, 1945.

MAURICE EDELBAUM,
Counsel for Petitioner.

APPENDIX

Constitution of the United States

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have assistance of Counsel for his defense.

Fourteenth Amendment (In part)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

Article One

Section 6. No person shall be held to answer for a capital or otherwise infamous crime, * * * unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and to be confronted with the witnesses against him * * *.

No person shall be deprived of life, liberty or property without due process of law.

Section 14. Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated.

New York Code of Criminal Procedure

Section 188. Magistrate to Inform Defendant of the Charge and His Right to Counsel.

When the defendant is brought before a Magistrate upon arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

Section 308. Defendant Appearing for Arraignment Without Counsel to be Informed of His Right to Counsel.

If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. * * *

Magna Charta

Section 39. No freeman shall be taken or imprisoned, or disseised, or outlawed, or banished, or in any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.

Section 40. To none will we sell, to none will we deny, or delay right or justice.

Section 45. We will not make any justices, constables, sheriffs, or bailiffs, but of such as know the law of the realm and mean duly to observe it.

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CHARLES ELMORE CROPLEY

In the Supreme Court of the United States

October Term, 1945

No. 152.

FRANK CANIZIO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE J. BELDOCK,
District Attorney,
Kings County,
New York.

HENRY J. WALSH,
WILLIAM I. SIEGEL,
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In the Supreme Court of the United States

OCTOBER TERM, 1945.

No. 152.

FRANK CANIZIO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari.

Statement.

The petitioner seeks a review of an order of the County Court of Kings County, dated April 13, 1945 (Sobel, C. J.), denying his motion to vacate and set aside a judgment of conviction against him, dated June 19, 1931. The motion was based on an allegation that at the respective times of his arraignment, when he pleaded not guilty to the indictment, and subsequently when he withdrew such plea and pleaded guilty, and again later when he appeared for sentence, he was not advised of his right to counsel, and was

in fact not represented by counsel. There has been no perfected appeal from the County Court order to any higher court.[1]

Question Presented.

Petitioner contends that the alleged failure to advise him of his right to counsel and to assign counsel to him had the result "that in the procurement of a judgment against your petitioner, in or about June, 1931 (R. 32) such judgment was had on a palpable violation of petitioner's constitutional rights" (R. 2).

Record Facts Material to the Question Presented.

On May 25, 1931, the petitioner, together with Patsy Guariglia and Tony Bruno, was indicted for the crimes of Robbery in the First Degree; Grand Larceny in the Second Degree, and Assault in the Second Degree, the indictment charging that, acting in concert, they took a taxicab by force and fear from one Joseph Grosshandler, Bruno being at the time armed with a revolver. On that day the defendants so named were arraigned before Kings County Judge Nova and pleaded not guilty. On June 1, 1931, they all personally appeared before Judge Nova, withdrew their pleas of not guilty and pleaded guilty to the crime of Robbery in the First Degree, unarmed. On June 19, 1931, the petitioner was sentenced to a term of fifteen to thirty years in State's Prison.

In the moving papers before Judge Sobel, the petitioner alleged that at the time of the arraignment and plea he was nineteen years of age and unfamiliar with legal procedure. He further claimed that on both of these occasions he was

[1] In a later portion of this brief we discuss the non-appealability of such an order in its relation to the questions presented by this petition.

without counsel, was not advised by the court of his right to counsel, and was not asked by the court if he desired that counsel should be assigned. He makes the same allegations with respect to the day of sentence. These allegations are now incorporated in the petition before this court (R. 10-11).

The respondents now, as in the proceeding in the County Court, challenge the accuracy of these allegations of non-representation by counsel. The records of the County Court in the matter are silent as to the fact of representation on the occasion of the petitioner's arraignment on May 25, 1931, and of his plea of guilty on June 1, 1931 (R. 4-5). They do show, however, that on June 17, 1931, and thus two days before the day of sentence on June 19, 1931, a notice of appearance was filed in his behalf by an attorney named John J. Olivia, and that Mr. Olivia appeared in his behalf on the day of sentence.

The People have heretofore urged, and do now respectfully contend, that as to the day of arraignment and the day of plea, a presumption of regularity exists to the effect that the trial court performed its duty in the premises and advised the petitioner of such rights as he enjoyed. The respondents now point out that with respect to the day of sentence the petitioner's statement that he was not represented by counsel is completely and effectually contradicted by the record.[2]

Jurisdiction.

The petitioner has not perfected an appeal from the order of April 13, 1945, denying his motion to vacate and set aside the judgment of conviction dated June 19, 1931, because such an order is not appealable (*People* v. *Gersewitz*, 294 N. Y. 163). The jurisdiction of this court is sought to be invoked under Section 237 (b) of the Judicial

[2] The effect of such representation by counsel at and before the time of sentence will be discussed at pages 5, 8, of this brief.

Code as amended (28 U. S. C. A., Sec. 344 [b]), on the ground that the order of the Kings County Court being under New York practice non-appealable, that court therefore becomes the "highest court of the state in which a decision could be had * * *."

It is our purpose in this brief to prove that jurisdiction does not exist for the purposes contended by the petitioner, because: (1), He has failed to exhaust his remedies in the courts of the State of New York, and thereby has not proceeded to the highest court in which a decision could be had, and (2), Because no federal question of due process of law is presented to this court.

Argument.

I.

The petitioner's contention may be briefly summarized as follows: by virtue of the law of New York, both constitutional and statutory, he was, if without counsel of his own choosing, entitled to have counsel assigned by the court at the time of arraignment, plea and sentence. The failure of the court to apprise him of such right and then to accord it to him was a deprivation of the rights guaranteed him under the Constitution of the United States.

That the right "to appear and defend in person and with counsel" is guaranteed by the Constitution of the State of New York (Art. 1, Sec. 6) is not disputed. That such a right is further implemented by statute (Code of Crim. Proc., Secs. 8, 308) is likewise conceded. That these rights have been violated, however, is disputed by the People. And, even if, conceding *arguendo*, such violation did occur, it is further disputed that any federal constitutional question is thereby presented.

The People submit that the petitioner has not sustained the burden of proving a failure at the time of arraign-

ment and plea to advise him of his right to counsel or to assign such counsel upon his request. The mere silence of the record in these respects does not assume the character of affirmative proof. It can never be presumed that a judicial officer has failed in the performance of a duty laid upon him by statute: in this instance the obligation to ask a defendant appearing for arraignment without counsel "if he desired the aid of counsel, and if he does the court must assign counsel" (Code of Crim. Proc., Sec. 308). On the contrary, presumption exists strongly that the court did perform its duty (*People ex rel. Kennedy* v. *Hunt*, 21 N. Y. Supp [2d] 302, aff'd 257 App. Div. 1039; *People* v. *Fisher*, 223 N. Y. 459, 464, where the court said:

> "It is a general rule that an official is presumed to have proceeded regularly, and when an official act has been done which can only be lawful and valid by the doing of certain preliminary acts, it will be presumed that those preliminary acts have also been done * * *. The assumption that officials do their duty applies in criminal cases * * *."

In the instant case, moreover, there is affirmative proof that before the day of sentence, petitioner was actually represented by counsel. Assuming, *arguendo*, that up to this point petitioner had been without benefit of counsel, the appearance of an attorney worked a great change in the situation. Such counsel could have moved in behalf of petitioner in effective manner to protect his rights and to remedy such infraction thereof as had occurred. Thus, a motion could have been made at any time prior to judgment for leave to set aside the plea of guilty on various grounds, including that of misapprehension of the nature of the plea of guilty, the youth and inexperience of the petitioner, etc. (Code of Crim. Proc., Sec. 337), and the court in its discretion would have had plenary power to grant such motion and put petitioner to his trial (*People* v. *Gowasky*, 244 N. Y. 451). This was not done. Counsel

for the petitioner appeared on June 19, 1931, participated in the proceedings and made no motions addressed to the plea itself or to any other defect or deficiency in the proceedings up to that point. Petitioner now contends that because of his youth and claimed inexperience he cannot be held to have waived any right to counsel (R. 11). As to his inexperience, that is at least a debatable characteristic, for the records on file in the Kings County Court indicate that in 1928 he was pronounced a juvenile delinquent and that in 1931 he was charged with the crime of Grand Larceny (although the charge was dismissed by the Grand Jury, on January 31, 1931).

As to the waiver, however, it is submitted by the People that, were the question of waiver in issue here, the failure of counsel to move at the time of or before sentence and judgment on behalf of the petitioner was indeed such a waiver arising out of the legal maxim *"qui facit per alium facit per se" (People* v. *Walker*, 198 N. Y. 329).

We proceed to the question of jurisdiction of this court to entertain the instant petition. If in fact the petitioner pleaded guilty to a crime without the benefit of counsel and in violation of the statutory direction that he be advised by the court of such right to counsel, and upon request assigned such counsel (Code of Crim. Proc., Sec. 308), then the judgment of the court subsequently entered on June 19, 1931, was a nullity (*People ex rel. Moore* v. *Hunt*, 258 App. Div. 24). From such void judgment he could have appealed even though the judgment was rendered on a plea of guilty (Code of Crim. Proc., Sec. 517; *People* v. *Ward*, 148 Misc. 94; *People* v. *Palaguay*, 216 App. Div. 508). The basic defect in the judgment would have been revealed in the record on appeal. It is precisely because a record on appeal discloses such defects that appeal is the proper remedy (*Matter of Morhous* v. *New York Supreme Court*, 293 N. Y. 131, 140). By such appeal he could have proceeded as a matter of right to the Appellate Division of the Supreme Court (Code of Crim. Proc.,

Sec. 520), and, under proper circumstances and by proper leave, to the Court of Appeals (Code of Crim. Proc., Sec. 520, subdiv. 3). In at least one of these two courts, both higher than and superior to the County Court of Kings County, there would have been a decision "by the highest court of a state in which a decision could be had" (Sec. 237 of the Judicial Code, Tit. 28, Sec. 344b). Instead, and as a matter of volition and choice, the petitioner abandoned all right of appeal and chose, some fourteen years after the event, to initiate this proceeding in the nature of a motion *coram nobis*.[3]

Section 237 of the Judicial Code does not mean that jurisdiction is conferred upon this court to review any cause wherein a final judgment or decree has been rendered by the highest court of a state in a particular proceeding *chosen by the litigant*. On the contrary, jurisdiction is conferred upon this court only after the litigant has been to the highest court in *any* proceeding which was open to him because of the nature of his grievance (*McKnight* v. *James, Warden of the Ohio Penitentiary*, 155 U. S. 685).

To re-state the proposition: by an appeal from the judgment of conviction the petitioner could have presented the present question either to the Appellate Division of the Supreme Court, or to that court and to the Court of Appeals and thus could have procured a determination by a court higher than the County Court of Kings County.

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[3] The advantage to the petitioner of such a choice is obvious and clearly exposes the reason motivating the choice. Had he proceeded to an appeal in 1931 he would, in the event of success on his part, have been immediately subjected to a trial at which the People could have procured witnesses and successfully have established the fact of his guilt of Robbery in the First Degree, while armed, for the carrying of the pistol by his confederate Bruno was in law its possession by this petitioner (*People* v. *Paradiso*, 248 N. Y. 123). Delay has worked in favor of the petitioner by almost geometric progression. Those witnesses who in 1931 could have been relied upon to establish the People's case cannot be produced in 1945 with the same facility, if they are at all in existence or producible.

In that event and if a federal question actually existed, this court would then have had jurisdiction by virtue of the Judicial Code, Sec. 344b. Petitioner's failure to avail himself of the right of appeal and his choice of a different method of procedure cannot confer a jurisdiction upon this court not otherwise existing.

The instant case therefore comes expressly within the opinion of Mr. Justice Frankfurter in *Whitman* v. *Wilson* (318 U. S. 688), in which he wrote as follows:

> "Since the argument in this case, the New York Court of Appeals formally dismissed petitioner's appeal to that court from the order of the Appellate Division denying him habeas corpus, on the ground that 'the case is one where appellant is not entitled to a writ of habeas corpus under Section 1231 of the Civil Practice Act'. But inasmuch as 'the constitutional questions which appellant asked the court to review are substantial,' to use the language of Chief Judge Lehman, he could, under New York practice, have gone to the Court of Appeals as of right if habeas corpus were the proper remedy. The merits of petitioner's constitutional claim have therefore never been passed on by, because never presented in an appropriate proceeding to, the highest available New York court. Consequently, it cannot be entertained here. *Since petitioner has misconceived the mode by which his constitutional claim may properly be brought before the New York courts, this petition should be dismissed.*
>
> Mr. Justice Roberts and Mr. Justice Reed join in this opinion." (Italics ours.)

It is also important to point out that after the appearance of counsel in behalf of the petitioner such an appeal might have been utilized to carry to the appellate court any claimed impropriety or injustice in the denial of a motion to set aside the plea of guilty had such motion been made (Code of Crim. Proc., Sec. 517; *People* v. *Joyce*, 41

Hun 641). This, we submit, is another instance of the demonstrated fact that the petitioner has failed to carry his case to the highest court in which a decision might have been had.

There is a further aspect to the failure of the petitioner to appeal from the judgment of conviction. If in law and in fact his constitutional rights had been violated by the failure to advise him of his right to counsel, and by the further failure to assign such counsel, and if there were no proceeding available to him in the state court to right this grievance (*e.g.*, a writ of habeas corpus or a motion *coram nobis*) then a constitutional question both state and federal might have been presented. (*Matter of Lyons* v. *Goldstein*, 290 N. Y. 191), where the court (speaking of Section 2188 of the Penal Law which prohibits the suspension or interruption of imprisonment after it shall have commenced), wrote:

> "If the order of Special Term were to be sustained upon a construction of the foregoing statutes in manner contrary to what we have found to be their proper construction, the statutes would be repugnant to the due process clauses of the Constitution of the United States and of the State of New York which can be satisfied, at least, only when a person may be granted a hearing upon the merits before a competent tribunal where he may appear and assert and protect his rights * * *. Indeed it is settled that to deny a person an opportunity to be heard on proof that he was defrauded or coerced into pleading guilty to a crime would impair a constitutional right * * *" (pp. 24, 25).

Such "hearing upon the merits before a competent tribunal" is however, provided in the motion *coram nobis* (*Lyons* v. *Goldstein*, *supra*) actually made by the petitioner. It is true that an order denying such motion is, under state statutes, not appealable (*People* v. *Gersewitz*, *supra*). There is, however, no constitutional right in the

State of New York to an appeal, such right being granted only by statute (*People* v. *Reed*, 278 N. Y. 5; *People* v. *Zerillo*, 200 N. Y. 443). In essence, therefore, the petitioner now complains to this court not that he has been deprived of a constitutional right in that no tribunal would hear his complaint *in any form*, but only because no appellate court would entertain an appeal. It therefore follows that there being no constitutional right of appeal, and there being an affirmative provision for a hearing which has been accorded the petitioner, none of his constitutional rights has been violated. He is in effect complaining to this court that the Constitution of the State of New York does not provide for a right of appeal other than as such right may be established by the legislature. We respectfully submit that such a complaint has never been held to be the basis of a federal question under the due process clause.

The question therefore arises as to the actual existence of a federal question under the due process clause, and may be stated thus: is there *under all circumstances* a federal constitutional right to the assignment of counsel? Petitioner asserts vociferously that such right exists. The People submit that in many instances and particularly in the instant case the right does not exist in such form that a deprivation thereof is a violation of either the Sixth or the Fourteenth Amendments to the Constitution of the United States. In support of this proposition we point to the decision of this court in *Betts* v. *Brady, Warden* (316 U. S. 455).

Betts was indicted in Maryland for the crime of Robbery. He was unable to employ counsel and so informed the court when arraigned, and requested that counsel be assigned. This request was refused on the ground that in that court it was the practice to appoint counsel for indigent defendants only on prosecutions for Murder and Rape. Betts thereupon, without waiving his claimed right to counsel, pleaded not guilty and proceeded to trial without a jury. At the trial witnesses summoned in his behalf

were examined and he cross-examined the state's witnesses. He did not take the witness stand. He was found guilty and sentenced to a term of eight years. While incarcerated, he filed with a judge of a county circuit court a petition for a writ of habeas corpus, based on the claim that he had been deprived of the right to counsel guaranteed by the Fourteenth Amendment of the Federal Constitution. The cause was heard on the writ, his contention rejected, and he was remanded to the custody of the warden. Thereafter he petitioned for a similar writ on the same grounds before the Chief Judge of the Maryland Court of Appeals, with a like result. Betts thereupon petitioned this court for a writ of certiorari which "on account of the importance of the jurisdictional questions involved and conflicting decisions upon the constitutional question presented" was issued. The constitutional question was put by Mr. Justice Roberts as follows:

> "Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?"

This court answered the question in the negative (Black, Douglas and Murphy, JJ., dissenting). The court held that there is no single all-embracing rule whereby the question of due process or a deprivation thereof can be determined, either in the case of the federal government (Fifth Amendment) or in the case of the states (Fourteenth Amendment). The court said:

> "The phrase (i.e. due process of law) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial *is to be tested by an appraisal of the totality of facts in a given case*" (462). (Italics ours.)

The court then proceeded to distinguish cases involving the denial of counsel (*Powell* v. *Alabama*, 287 U. S. 45; *Avery* v. *Alabama*, 308 U. S. 444; *Smith* v. *O'Grady*, 312 U. S. 329), from the facts in the instant case. Here it was found that:

> "In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation."

If we apply the standard adopted by this court in *Betts* v. *Brady*, to the circumstances surrounding the arraignment and conviction (by his own plea of guilt) of the petitioner, there is evident, nay obvious, a striking similarity in the cases. This petitioner was no mere youth, innocent of the crime of which he was charged, ignorant of the rules of law, and bewildered by the formality of courts and court procedures. As we have said, he had already been

adjudged a juvenile delinquent and must therefore, have appeared in a court for that purpose and in connection with that experience (as a result of which in 1928, he was incarcerated in the House of Refuge [R. 15]). He had also been arrested for the crime of Grand Larceny and must have appeared again in a Magistrates' Court for the hearing which held him for the action of the Grand Jury. The independent investigation of the court which here sentenced him disclosed that after the petitioner and his accomplices had, at the point of a gun, stolen the taxicab involved in the indictment, they held up and robbed two other men, and that the next night they stole a Buick automobile (R. 16). In this stolen automobile they proceeded to a further Attempted Robbery, but were apprehended. In the automobile were found four fully loaded revolvers. One contained bullets which this petitioner "admitted that he sliced the point of the bullet and in the language of one understanding that knows that permits the lead to spread out when the bullet is fired and when it reaches the object it hits causing more certainty of death or injury and prevents the bullet in spreading the object that it hits from being identified later on" (R. 17).

It should be remembered, in answer to the petitioner's claim of youth and inexperience, that at the time he pleaded guilty to Robbery in the First Degree, unarmed, he faced a much more severe sentence, if convicted after trial on the indictment for Robbery, while armed. Moreover, he also faced prosecution on another indictment for the theft of the Buick automobile. It is beyond question that his plea of guilt with respect to the robbery and theft of the taxicab was induced, not by any inexperience or lack of knowledge, but by the fact that such plea guaranteed him a dismissal of the other indictment with respect to the Buick automobile (R. 18). He is very definitely like the petitioner Betts, of whom the court, with an understatement equally applicable to this petitioner, said: "was not wholly unfamiliar with criminal procedure".

We therefore submit that under the latest and most authoritative decision of this court the failure to apprise this defendant of his right to counsel, if such failure actually occurred, was not a violation of any right guaranteed to him by the federal constitution, and, therefore, regardless of any right created in his behalf by New York statute or constitutional law, did not raise a federal question for the consideration of this court. We believe the language of this court in *Betts* v. *Brady, supra,* may be quoted by us as a complete answer to the petitioner's contention:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel" (473).

In Conclusion.

We respectfully submit:

1. The case presented by the petitioner is not one concerning which this court has jurisdiction under Section 237 of the Judicial Code, Tit. 28, Sec. 344b, because of the fact that no "final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * *."

2. That no federal question is raised by any contention made by the petitioner in the case presented to this court.

II.

The petition should be denied.

Respectfully submitted,

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Appendix.

Section 517, New York Code of Criminal Procedure.

"Sec. 517. *In what cases an appeal may be taken by defendant.*

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals. * * *."

Section 520, New York Code of Criminal Procedure.

"Sec. 520. *Appeal, a matter of right; one appeal; how taken.*

All appeals, provided for by this chapter may be taken as a matter of right. Every person convicted in a criminal action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appellate tribunal as herein provided, but there shall be only

one such appeal and the decision of the appellate court shall be final, and no appeal shall lie from that court to any other court except as hereinafter provided:

1. In the City of New York such appeals shall be taken as follows: * * * from a conviction by the court of general sessions of the County of New York or by a county court within said city * * * except where the penalty is death, to the Appellate Division of the Supreme Court * * *.

2. * * *

3. Where an appeal has been taken and has been decided by any of the appellate tribunals referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not otherwise. If a judge of the court of appeals or a justice of the Appellate Division of the Supreme Court * * * certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.

4. * * *."

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In the Supreme Court of the United States

October Term, 1945

No. 152.

FRANK CANIZIO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK.

RESPONDENTS' BRIEF.

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In the Supreme Court of the United States

OCTOBER TERM, 1945

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Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COUNTY COURT OF KINGS COUNTY, STATE OF NEW YORK.

RESPONDENTS' BRIEF.

Opinion Below.

The petitioner proceeded by motion, *coram nobis*, in the County Court, Kings County, for an order vacating and setting aside a judgment of conviction against him dated June 19, 1931. The motion was based on the claim that at the respective times of his arraignment, when he pleaded not guilty to the indictment, and subsequently when he withdrew such plea and pleaded guilty, and again

later when he appeared for sentence, he was not advised of his right to counsel, and was in fact not represented by counsel. The motion was denied by an order made April 13, 1945 (Sobel, C. J.), unaccompanied by any opinion.

Jurisdiction.

The order of April 13, 1945, denying petitioner's motion to vacate and set aside the judgment of conviction dated June 19, 1931, was not appealed from. The order is not appealable (*People v. Gersowitz*, 294 N. Y. 163).[1] The jurisdiction of this Court is, therefore, sought to be invoked under section 237 (b) of the Judicial Code as amended (28 U. S. C. A., Sec. 344 [b]) on the ground that the order of the Kings County Court, being under New York practice non-appealable, constitutes that court "the highest court of the state in which a decision could be had * * * *"

It is our purpose to show in this brief that jurisdiction does not exist, as contended by the petitioner, because: 1. on all of the facts, no federal question of due process of law is presented to this court; and 2. the petitioner has failed to exhaust his remedies in the state courts and for this reason has not proceeded to the highest court in which a decision could be had.

Questions Presented.

The petitioner raises the following questions (petitioner's brief, p. 3):

1. Petitioner was deprived of his constitutional rights in that on the motion to vacate the judgment of conviction he was not accorded a full and complete hearing.

2. Petitioner was deprived of his constitutional rights in that he was not advised of the right to counsel.

[1] Later in this brief we discuss the non-appealability of the order in relation to the questions involved on this appeal.

Statement of the Case.

On May 25, 1931, the petitioner was indicted, together with Patsy Guariglia and Tony Bruno, for the crimes of Robbery in the First Degree, Grand Larceny in the Second Degree, and Assault in the Second Degree. The indictment charged that the defendants, acting in concert, by force and fear took from one Joseph Grosshandler a taxicab, Bruno then being armed with a revolver. On that day all of the defendants were arraigned before Kings County Judge Nova and pleaded not guilty. However, on June 1, 1931, they all personally appeared before Judge Nova, withdrew their pleas of not guilty, and pleaded guilty to the crime of Robbery in the First Degree, unarmed. On June 19, 1931, the petitioner was sentenced to a term of fifteen to thirty years in State's Prison.

In the moving papers before Judge Sobel the petitioner alleged that at the time of the arraignment and also of plea he was nineteen years of age, unfamiliar with legal procedure; was without counsel, was not advised by the court of his right to counsel, and was not asked by the court if he desired that counsel should be assigned. A similar allegation was made as to the lack of counsel on the day of sentence (R. 6-7).

The respondents here challenge, as in the proceeding in the County Court they challenged, the accuracy of these allegations of non-representation by counsel. While the records of the County Court in the matter are silent as to the fact of representation at the time of the petitioner's arraignment on May 25, 1931, and of his plea of guilty on June 1, 1931 (R. 11), they do show that on June 17, 1931, and thus two days before the petitioner was sentenced on June 19, 1931, a notice of appearance was filed in his behalf by an attorney named John J. Olivia (R. 22); and that Mr. Olivia appeared for him on the day of sentence (R. 24, *et seq.*).

The respondents urge that, with respect to the day of arraignment and the day of plea, a strong presumption of regularity exists that the trial court performed its duty in the premises and advised the petitioner of such rights as he enjoyed in this regard. Concerning the petitioner's statement that he was not represented by counsel on the day of sentence, we point out that such contention is completely and effectually contradicted by the record.[2]

Argument.

I.

The Constitution of the State of New York (Article 1, Section 6) provides that "* * * In any trial in any court whatever the party accused shall be allowed to appear and defendant in person and with counsel as in civil actions, and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him * * *".

Petitioner has claimed that the right to be advised of counsel, in addition to being based on statutes hereinafter discussed, is also protected by the constitutional provision just quoted. We have found no New York case discussing this point insofar as it is alleged to concern the right of a defendant at the time of arraignment and plea. It has been held, however, and to the direct contrary, in New Jersey, that a constitutional provision of that state (Article 1, Section 8) entitling a defendant to the assistance of counsel in his defense, does not apply to the time of arraignment.

In *State* v. *Murphy* (87 New Jersey Law Reports 515), the trial court refused to charge the jury in a murder case that it might take into consideration, on the question of the voluntariness of a confession, the fact that the defend-

[2] The effect of such representation by counsel at and before the time of sentence will be discussed at pages 9-13; 26 of this brief.

and was not represented by counsel at the time of arraignment. The Court of Errors and Appeals with respect to this contention, and in considering the New Jersey Constitutional Provision (almost identical with that of New York), wrote as follows:

> "It is to be observed that the Constitution does not provide that the defendant shall have the right to have assistance of counsel from the time of his arrest, but for his *defense*. Obviously, the word *defense*, as here used, means that a defendant is entitled to be represented and defended by counsel when put in jeopardy on his trial, and that his counsel shall have reasonable access to the prisoner for the purpose of preparing his defense. A criminal defendant at large on bail has this latter privilege to the full. By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess. *Confession* is a thing entirely apart from *defense* upon a trial. This is evidenced every day by the pleas of guilty made by criminal defendants without the assistance of counsel to advise them thereon. A plea of guilty amounts to a confession in open court."

We submit, therefore, that such rights as the petitioner enjoys in New York with respect to counsel are statutory in the first instance and derivative from the Fourteenth Amendment to the Federal Constitution in the second instance, and that they are in no way derived from the Constitution of the State. (See Appendix to opinion, *Betts v. Brady*, 316 U. S. 455.)[3] The specific statute is section 308 of the Code of Criminal Procedure. It is disputed by the respondents that these statutory rights have been violated, even at the time of the arraignment and plea by the

[3] In this appendix, New York is listed among the states which require the provision of counsel by statute only.

petitioner, and certainly with respect to the time of his sentence.

The record concerning the days of arraignment and plea is negative in character. The clerk's minutes (Vol. 323, p. 89) do not show the name of any counsel appearing for the petitioner at the time of arraignment, when he pleaded not guilty. Judge Nova's daily calendar for that day is not available. The reverse side of the indictment on which the notation of the plea of not guilty is entered has a printed line reading as follows: "Counsel assigned yes no". The words "yes" and "no" are both stricken out (R. 2-3). As against this we have the petitioner's self-serving declaration, made many years after the event, that when arraigned and on the day of plea he was without counsel, was not asked by the court whether he desired the assistance of counsel, and was not advised by the court of such right (R. 6); and the further statement by the clerk of the court of the general practice, insofar as *he personally* was concerned, not to advise the defendant of his right to counsel when such defendant pleaded guilty (R. 3).

On such state of the record the petitioner has not sustained the burden of proving the central fact, so necessary to his cause, that at the time of arraignment and plea he was not advised of the right to counsel. The mere silence of the record in these respects does not assume the character of affirmative proof. The statement of the clerk (R. 3), while made in good faith with respect to his own practice, cannot be accepted as decisive proof that the court itself did not advise the defendant of his rights at the time of arraignment. It can never be presumed that a judicial officer has failed in the performance of a duty laid upon him by statute: as here, the obligation to ask a defendant appearing for arraignment without counsel "if he desired the aid of counsel, and if he does the court must assign counsel" (Code of Crim. Proc., Sec. 308). On the contrary, a strong presumption exists that the court did perform its duty (*People ex rel. Kennedy* v.

Hunt, 21 N. Y. Supp. [2d] 302, aff'd 257 App. Div. 1039; *People* v. *Steinmetz*, 240 N. Y. 411; *People ex rel. Kammerer* v. *Brophy*, 255 App. Div. 821; *People* v. *Fisher*, 223 N. Y. 459, 464). In the *Fisher* case the Court of Appeals said:

> "It is a general rule that an official is presumed to have proceeded regularly, and when an official act has been done which can only be lawful and valid by the doing of certain preliminary acts, it will be presumed that these preliminary acts have also been done * * *. The assumption that officials do their duty applies in criminal cases * * *."

Petitioner urges that this presumption of official regularity falls in the face of the deficiencies in the record, and cites in support of such contention *People* v. *McLaughlin* (291 N. Y. 480; petitioner's brief, pp. 22-23). The *McLaughlin* case, however, makes no such holding. There the defendant, indicted for a serious crime, informed the trial court at about 12.30 P. M. that it was necessary for him to procure a new lawyer. The court took away from him the opportunity so to do, assigned counsel to him and directed that the case proceed to trial at 2 o'clock that afternoon—all without a request from the defendant that counsel be assigned to him. The trial did proceed at 2 o'clock that afternoon and "twenty-four hours later defendant stood convicted of robbery in the first degree. He received the mandatory sentence of from ten to thirty years in prison". The judgment of conviction was reversed solely on the ground that defendant had a right, protected by both the federal and state constitutions to defend in person or by counsel of his own choosing, and that such right included a private interview with counsel prior to trial. Here, it was held, no fair opportunity to secure counsel of his own choice and to prepare for trial was accorded to the defendant. The court did use the language quoted at page 22 of the petitioner's brief. In its appropriate context, it of course had relevance to the

problem there under review. Here it does not forward judicial inquiry.

That the burden of proving the violation of his rights in the failure to advise him concerning counsel rests upon the petitioner has been held by this court in *Johnson* v. *Zerbst* (304 U. S. 458). There the court wrote:

> "It must be remembered, however, that a judgment can not be lightly set aside by collateral attack, even on *habeas corpus*. When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel.*" (Italics ours.)

The spiritual ancestor of this petition, and likewise a case which has fostered many more petitions of identical nature in the State of New York in the last half decade, is *People ex rel. Moore* v. *Hunt* (258 App. Div. 24). There the relator sued out a writ of *habeas corpus* to test a judgment of conviction, alleging that at the time of his arraignment he was deprived of his right with respect to counsel in a manner identical with that claimed by the instant petitioner. The order sustaining the writ was affirmed by the Appellate Division on the opinion of the court of first instance. The strong reliance placed on this case in the instant proceeding and in its numerous prototypes makes it important to point out the differences in fact. In the *Moore* case, the sentencing judge admitted the truth of the petitioner's allegations that he had not been advised with respect to counsel. On the writ, therefore, the court held that "*in the light of this opinion of the sentencing judge* it seems to me that it is proper to find that the part of the record of conviction which reads 'was asked if he desired the aid of counsel, to which he

answered * * *, was considered inapplicable because the defendant did not desire a trial". (Italics ours.) It is submitted that a case which rests upon a concession by the officiating judge that he had not followed the statute cannot be a valid precedent for a case such as the instant proceeding where there is no similar admission of fact.

If we concede, *arguendo*, that in point of fact the petitioner was actually not advised of his right to counsel at the time of arraignment and plea it still remains true that, under all of the facts of this case, neither his federal rights under the Fourteenth Amendment to the Constitution nor his statutory rights under section 308 of the Code of Criminal Procedure have been violated. This follows from the fact that at the time of sentence on June 19, 1931, he was actually represented by counsel (Mr. Olivio: R. 22, 24-29). The petitioner denies such representation. It is submitted that the denial has neither merit nor weight. The record discloses the filing of a notice of appearance on his behalf, and further shows an actual participation by counsel on the day of sentence in the form of a plea on behalf of the petitioner. It may be urged, and informally it has been stated by the petitioner, that if such counsel actually appeared, it was not because the petitioner had retained him. That may very well be, and indeed it is a possibility that the sister of the petitioner brought Mr. Olivia into the case (R. 24). It is clear, however, from the record that the petitioner on the day of sentence saw Mr. Olivia in court and did nothing to repudiate his retainer by some other member of the petitioner's family.

We now urge that such participation by counsel constitutes an "intelligent" and "competent" waiver (*Johnson v. Zerbst*, 304 U. S. 458) by the petitioner of any right secured to him under section 308 of the Code of Criminal Procedure and by the Fourteenth Amendment to Federal Constitution. Petitioner's counsel at that point had various remedies which he could have invoked with respect to such alleged violation. The judgment itself was voidable:

An appeal could have been taken, even though it was rendered on a plea of guilty (Code of Criminal Procedure, Sec. 517; *People* v. *Ward*, 148 Misc. Rep. 94; *People* v. *Palagiay*, 216 App. Div. 508). The record on such appeal would have revealed any basic defect in the judgment. (It is precisely because a record on appeal discloses such defects that appeal is the proper remedy. *Matter of Morhous*, 293 N. Y. 131, 140.) Such appeal could have been prosecuted as a matter of right to the Appellate Division of the Supreme Court (Code of Crim. Proc., Sec. 520), and, under proper circumstances and by proper leave, to the Court of Appeals (Code of Crim. Proc., Sec. 520, Subdiv. 3).

Counsel could also on the day of sentence have moved to set aside the plea of guilty on various grounds, including that of misapprehension of the nature of the plea, the youth and inexperience of the petitioner, etc. (Code of Crim. Proc., Sec. 337). This court in its discretion, on such a motion, would have had plenary power to grant the relief and put the petitioner to his trial (*People* v. *Gowasky*, 244 N. Y. 451). The appeal from the judgment would have brought up for review a denial of such motion, had it been denied (Code of Crim. Proc., Sec. 517; *People* v. *Joyce*, 41 Hun 641). This procedure, counsel for the petitioner did not follow, and by failing to do so he acquiesced in the proceedings to that point and clearly waived any irregularity which had occurred prior to the day of sentence. Such waiver by him is a waiver by the petitioner arising out of the legal maxim "*qui facit per alium facit per se*" (*People* v. *Walker*, 198 N. Y. 329). That it is an intelligent waiver does not seem to us to be debatable. Indeed, it is the highest and clearest form of waiver because it is made, not by a layman, but by a lawyer conversant with all of the rights belonging to this petitioner.

The waiver thus existing, results in a complete answer to the petitioner's plea for the relief sought. It has been held in numerous cases, both in the State of New York

and in this court, that the right to be advised as to counsel is one which can be waived.

In *Johnson* v. *Zerbst*, *supra*, this court said:

> "A waiver is ordinarily an intentional relinquishment or abandonment of any known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case including the background, experience, and conduct of the accused."

This court in the same case also said, speaking of the accused's right to counsel under the Sixth Amendment to the Federal Constitution:

> "When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence."

In *Adams* v. *United States* (317 U. S. 269) this court wrote as follows:

> "This brings us to the merits. They are controlled in principle by *Patton* v. *United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, 70 A. L. R. 263, and *Johnson* v. *Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, *and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel.* There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer. In taking a contrary view, the court below appears to have been largely influenced by the radiations of this court's

opinion in *Glasser* v. *United States* (315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680). But *Patton* v. *United States*, *supra*, and *Johnson* v. *Zerbst*, *supra*, were left wholly unimpaired by the ruling in the *Glasser* case."

Certainly, the instant case falls well within the spirit of these decisions. At a moment when the petitioner might in the Kings County Court have asserted the impropriety of his plea of guilty and, therefore, the invalidity of the proceedings from that point on, his counsel waived on his behalf all such rights and consented to proceed to the decisive act of sentence. That the petitioner now regrets such acquiescence on his behalf by counsel does not affect the regularity of counsel's procedure or its binding effect on the petitioner. This has been expressly ruled in two cases in the appellate courts of New York.

In *People* v. *Markowitz* (119 App. Div. 841, aff'd 189 N. Y. 562) the defendant was convicted of the offense—it is not a crime—of disorderly conduct. The Appellate Division affirmed, and with respect to the point now here under inquiry, wrote as follows:

> "It is also claimed that the judgment is erroneous because the court did not inform the defendant of his right to counsel. It is true this does not specifically appear, but it does appear that the defendant had counsel who made a motion at the close of the people's case that he be acquitted. His rights were fully protected, and there are no errors which call for a reversal of the judgment."

We submit that there is a complete analogy between the appearance of counsel at the trial, who makes a motion for an acquittal, and the appearance of counsel on the day of sentence who fails to make a motion to set aside a plea of guilty and who further fails to take an appeal from the judgment on which the merits of such motion would be considered if the motion were denied.

A case exactly in point is *People ex rel. Kennedy* v. *Hunt* (257 App. Div. 1039). There a writ of *habeas corpus* to test the legality of the relator's imprisonment, under his contention that he had not been advised of his right to counsel prior to a plea of guilty, was dismissed. The Appellate Division in affirming the order dismissing the writ, said:

> "That the relator 'competently and intelligently' waived his Constitutional right to counsel when he pleaded guilty is sufficiently established by the evidence. If the fact were otherwise, the defect was cured when relator, though represented by counsel, failed to raise the question when the sentence complained of was imposed upon him."

We submit that this decision is determinative of the question here involved.

Petitioner's brief is profusely strewn with citations of decisions of this court and with quotations of cogent language from such cases. It needs but cursory examination to disclose the inapplicability of these decisions to the instant case, affected as it is so completely by the fact of the intelligent and free waiver of the petitioner's rights.

We turn to those upon which the petitioner lays his greatest emphasis and reliance.

In *Powell* v. *Alabama* (287 U. S. 45), the defendants were charged with the crime of Rape. Up until the very morning of the trial no counsel had been assigned to them except that the court had "appointed all of the members of the Bar" for the purpose of arraignment—a practice which this court held to be "far short of meeting, in any proper sense, a requirement for the appointment of counsel". On the morning of trial there appeared counsel who had had no previous consultation with the defendants. On the same morning further counsel was appointed by the court and the case immediately went to trial. Of such procedure this court wrote:

"Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities."

* * * * * * *

"But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances we need not determine. All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law, and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of a case."

In *Avery* v. *Alabama* (308 U. S. 444), the defendant was indicted for Murder. Counsel was assigned on his behalf and entered pleas of not guilty and not guilty by reason of insanity. On the day of trial counsel requested an adjournment in order to continue their investigation. The request was denied and the defendant was convicted. This court upheld the judgment of conviction on the ground that it did not appear that the denial of the motion for an adjournment had actually prejudiced the adequate preparation of the defendant's case.

It is true that the court used the language quoted at page 30 of the petitioner's brief. As a statement of con-

stitutional principle, that language is of great force. That it is not apposite, however, needs no argument. There is other language in the decision which the petitioner fails to quote. A reading of it discloses the obvious reason for such failure of quotation. This court said:

> "In determining whether petitioner has been denied his Constitutional right of assistance by counsel, we must remember that the Fourteenth Amendment does not limit the power of the states to try and deal with crimes committed within their borders, and was not intended to bring to the test of a decision of this court other rulings made in the courts of a state trial. Consistently with the preservation of constitutional balance between state and federal sovereignty, this court must respect and is reluctant to interfere with the state's determination of local, social policy."

This, we submit, is but another way of saying that on the question of waiver, if the same is freely and intelligently made, the decisions of the state court, (*People v. Markowitz, supra; People ex rel. Kennedy v. Hunt, supra*) will be followed by this court.

In *Smith v. O'Grady* (312 U. S. 329), the defendant was arrested in a Nebraska county, was removed to another county and there told that he was wanted in a third county for burglary. He was also promised that if he would plead guilty, he would be dealt with leniently, and that he would receive a sentence of not more than three years. He was subsequently transferred to the third county. He tried unavailingly to procure a copy of the charges against him. He was arraigned, and upon his prearranged plea of guilty was sentenced to a term of twenty years in the penitentiary. He protested vigorously and continued to ask the court for a copy of the charges to which he had pleaded guilty. This request was refused and he thereupon asked permission to withdraw his plea of guilty, and requested the appointment of counsel to ad-

vise him. This also was refused and "within the hour" he was on his way to the penitentiary. There he discovered that he had been duped into pleading guilty, not to a simple charge of burglary, but to a charge of burglary with explosives, punishable in that state by imprisonment of twenty years to life. On such record this court found that if the facts alleged were true, the petitioner had been entrapped and imprisoned unconstitutionally. The absence of any counsel at any point in the proceedings, however, completely destroys all possibility of relevance with the case now under consideration.

In *Glasser* v. *United States* (315 U. S. 60), the defendant was indicted with others for conspiracy to defraud the United States. Defendant was represented by counsel. On the day of trial one of the other defendants repudiated counsel whom he theretofore had had. Defendant's counsel was then asked by the court if he would serve for both defendants. Reluctantly, such assignment was accepted by defendant's counsel. Of such procedure this court wrote:

> "The trial court should protect the right of an accused to have the assistance of counsel. 'This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting appropriate for that determination to appear upon the record.' *Johnson* v. *Zerbst*, 304 U. S. 458, 465, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461.
>
> "No such concern on the part of the trial court for the basic rights of Glasser is disclosed by the record before us. The possibility of the inconsistent interest of Glasser and Kretske was brought home to the court, but instead of jealously guarding Glasser's rights, the court may fairly be said to be responsible for creating a situation which resulted in

the impairment of those rights. For the manner in which the parties accepted the appointment indicates that they thought they were acceding to the wishes of the court. Kretske said the appointment could be accepted 'if your Honor wished to appoint him (Stewart)', and Stewart immediately replied: 'As long as the court knows the situation. I think there is something in the fact that the jury knows we cannot control that.' The court made no effort to reascertain Glasser's attitude or wishes. Under these circumstances to hold that Glasser freely, albeit tacitly acquiesced in the appointment of Stewart is to do violence to reality and to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."

In *Snyder* v. *Massachusetts* (291 U. S. 97), no more was held than that permitting a jury on a murder trial to have a view of the premises, while accompanied by the judge, district attorney and accused's counsel, but without the presence of the accused in person, is not an infringement of the Fourteenth Amendment to the Federal Constitution even though such view was charged by the trial court to be part of the evidence in the case.

In *Palko* v. *Connecticut* (302 U. S. 319), the defendant, indicted for Murder in the First Degree, was convicted of Murder in the Second Degree. That state, pursuant to a statute, appealed the judgment, claiming error committed on the trial against the people. The judgment was reversed and the defendant was again placed on trial. He claimed double jeopardy and urged the unconstitutionality, federally, of the statute permitting the appeal by the people. This court overruled such contention and held that the permission to appeal (and the right to re-try the defendant if the appeal be successful) was not such double jeopardy as is banned by either the Fifth Amendment directly or the Fourteenth Amendment by the inclusive prohibition against deprivation of life, liberty or property without due process of law.

In *Chambers* v. *Florida* (309 U. S. 227), the defendants were arrested in connection with a murder. Confessions were obtained from them which were used on the trial and from which resulted a conviction. On a writ of certiorari this court found that the confessions had been extorted by a process of rigorous and long-continued questioning under circumstances which the court determined to be violative of the Fourteenth Amendment, even though there was no uncontradicted proof of physical violence.

In *United States* v. *Haupt* (136 Fed. [2d] 661), the defendants were indicted and convicted of the crime of Treason. Written confessions were obtained and admitted in evidence, although the defendants were not arraigned before a United States commissioner (Sec. 595, 18 U. S. C. A.) until several weeks after such confessions had been made. In fact however, the defendants had executed a written waiver of custody, construed by the court to be a waiver of the right to be taken before a committing officer. The Circuit Court of Appeals found that prior to the execution of such waiver the defendants were not advised by counsel of their rights and that there is no satisfactory proof that the defendants had knowingly waived such rights. The court based its decision on the position that even if there had been such a waiver, it would be ineffective to excuse the federal agents who procured the waiver of a breach of their duty to present the defendants before an examining commissioner. The court therefore held the admission of the confessions to be error; and for this and other reasons reversed the conviction.

In *Evans* v. *Rives* (126 Fed. [2d] 633), in a *habeas corpus* proceeding the petitioner alleged that he was convicted upon his own plea of guilty, of non-support of a minor without having been advised of his right to counsel. The Circuit Court of Appeals found this to be a fact and reversed the conviction. There is however in this case, no question of waiver raised by the appearance of counsel at any time during the proceedings.

In *Feldman* v. *United States* (322 U. S. 487), the defendant was convicted of using the mails to defraud. He had previously testified in supplementary proceedings in the New York State court, and such testimony, including matters claimed to be admissions with respect to his later prosecution under the mail fraud indictment, was admitted in evidence on that later trial. It was held by this court that, even assuming such evidence to be inadmissible against the defendant in a prosecution in the State Court by reason of an immunity granted by Civil Practice Act, section 789, the use thereof in a federal prosecution was not barred by the Fifth Amendment to the Federal Constitution. The prohibition of that amendment against compelling a defendant to be a witness against himself applies only to prosecutions initiated by the Government in the federal courts.

In *Williams* v. *Kaiser* (323 U. S. 471), the defendant was convicted in Missouri of the crime of Robbery. On a writ of *habeas corpus* he asserted that at his trial he had requested the aid of counsel, which was refused. The petition before the Supreme Court of Missouri was denied without requiring the state to answer or without giving the petitioner an opportunity to prove his allegations. This court reversed the decision of the Missouri court.

In *Rice* v. *Olson* (89 L. Ed. 903), the defendant, an Indian, pleaded guilty to burglary in Nebraska. He thereafter sued out a writ of *habeas corpus* alleging that he had been deprived of his constitutional right to counsel. The state district court dismissed the petition and was upheld by the State Supreme Court which did not require the state to answer. The affirmance was upon the ground that unless the defendant requests the assignment of counsel a waiver is "absolutely" established. This court held such position to be error and reversed the Nebraska Supreme Court.

In this connection we touch upon the petitioner's contention (Petitioner's brief, p. 3) that the County Court of Kings County should not have denied the petition without

an opportunity to him to be heard on the merits. We take this to mean that the petitioner believes he should have been accorded an oral hearing. If this be so, then we submit that there is no absolute right in matters of this type to such an oral hearing. The petitioner is entitled to a day in court, but it is within the power of the state courts to regulate and determine the mechanics and procedure by which such right shall be observed. The establishment of a motion to be determined on affidavits instead of oral hearing does not violate any right of the petitioner. Moreover, it comes within the spirit of the decision of this court in *Avery* v. *Alabama*, *supra*, where it was said:

> "Consistently with the preservation of constitutional balance between state and federal sovereignty, this court must respect and is reluctant to interfere with the state's determination of local, social policy."

And pertinent, too, is the language of this court in *Snyder* v. *Massachusettes*, *supra*; where it is written:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental (citing cases). Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

The petitioner misconceives the nature of a motion, *coram nobis*, and obviously confuses it with a writ of *habeas corpus*, where the petitioner is actually present in court. It has been held, however, that a writ of *habeas corpus* will not lie in the instant case, and that the motion *coram nobis* is the sole remedy (Matter of Morhous, 293 N. Y. 131). This court will follow the rules of the state

court as to such matter of procedure (*Whitman* v. *Wilson*, *infra* p. 28).

There is another ground on which the respondents assert that no federal question under the due process clause exists in this case. Petitioner has asserted that under all circumstances there is a federal constitutional right to the assignment of counsel in state court prosecutions. We submit that such right as distinguished from the conceded right to counsel in federal prosecutions (Sixth Amendment) does not exist to the all-inclusive degree urged by the petitioner, and that there are many circumstances under which the right cannot be asserted.

We have already touched upon the fact that the right may be waived. We assert now that due to the particular circumstances of this case and in addition to the fact of waiver, there has been no violation of the Fourteenth Amendment to the Constitution. In support of this proposition we point to *Betts* v. *Brady* (316 U. S. 455).

Betts was indicted in Maryland for the crime of Robbery. He informed the court, when arraigned, that he was unable to employ counsel and requested the assignment of a lawyer. The court refused such assignment, stating that it was the practice to appoint counsel for indigent defendants only in prosecutions for murder and rape. Thereupon Betts, without waiving his claimed right to counsel, pleaded not guilty and proceeded to trial without a jury. Witnesses summoned in his behalf were examined, and he cross-examined the state's witnesses. He himself did not take the stand. Upon a verdict of guilty he was sentenced to a term of imprisonment for eight years. While thus incarcerated he filed with a judge of a county circuit court a petition for a writ of *habeas corpus*, claiming that he had been deprived of the right to counsel guaranteed by the Fourteenth Amendment to the Federal Constitution. The cause was heard on the writ, his contention rejected and he was remanded to the custody of the warden. He thereafter petitioned for a similar writ on the same grounds before the chief judge of the Maryland Court of Appeals

and with a like result. This court allowed a writ of certiorari, the constitutional question being put by Mr. Justice Roberts as follows:

> "Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?"

The court answered the question in the negative, and held that there is no one, all-inclusive rule whereby the question of due process or a deprivation thereof can be determined, either in the case of the federal government (Sixth Amendment) or in the case of the states (Fourteenth Amendment). The court said:

> "The phrase (i. e. due process of law) formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial *is to be tested by an appraisal of the totality of facts in a given case*" (462). (Italics ours.)

The court then proceeded to distinguish cases involving the denial of counsel (*Powell* v. *Alabama*, 287 U. S. 45; *Avery* v. *Alabama*, 308 U. S. 444; *Smith* v. *O'Grady*, 312 U. S. 329), from the facts in the instant case. Here it was found that:

> "In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary

intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation."

An application of the standard thus adopted in *Betts v. Brady*, to the circumstances surrounding the arraignment and conviction (by his own plea of guilt) of the petitioner, discloses a striking similarity in the cases. The affecting picture which the petitioner paints of himself is not one true to his own life. He was not a mere youth, innocent of the crime with which he was charged, ignorant of the rules of law, and bewildered by the formality of courts and procedure. He had, on the contrary, already been adjudged a juvenile delinquent and, therefore, had already appeared in a court for that purpose, and in connection with that experience, as a result of which in 1928 he was incarcerated in the House of Refuge (R. 28). The probation investigation of the court which sentenced him disclosed that after the petitioner and his accomplice had, at the point of a gun, stolen the taxicab involved in the indictment, they robbed two other men, and the next night stole a Buick automobile. In this stolen automobile they proceeded to a further attempted robbery but were apprehended. Four fully loaded revolvers were found in the car. One contained bullets which the petitioner had admittedly sliced in order to make more certain the death or injury of the victim, and to prevent the identification of

the bullet (R. 26). These facts portray, not an innocent youth, but an accomplished and hardened criminal who had learned completely, albeit too early, almost the entire curriculum of crime. It should be pointed out that at the time of the plea he faced prosecution on another indictment for the theft of the Buick automobile and for the other robbery. It cannot be questioned that his plea of guilty in the instant case was induced, not by the inexperience or lack of knowledge, but by the fact that such plea guaranteed him a dismissal of the other indictments. He is completely like the petitioner Betts, of whom this court, with an under-statement equally applicable to this petitioner, said, "was not wholly unfamiliar with criminal procedure".

Petitioner draws a distinction with the *Betts* case in the fact that in Maryland there was no statutory requirement for the appointment of counsel. We concede a certain measure of distinction, but the difference is not as complete as urged by the petitioner. Section 188 of the Code of Criminal Procedure cited by petitioner (Brief, p. 56), applies only to the magistrates' court and does not require the appointment of counsel. It merely gives the defendant the right to be apprised of the fact that he himself may retain counsel before any further proceedings are had. Section 308 of the Code of Criminal Procedure does direct that the defendant, if appearing for arraignment without counsel "must be asked if he desire counsel and if he does the court must assign counsel". The choice is voluntary and lies with the defendant. He may choose counsel of his own, in which event the court has no right to appoint counsel on his behalf (*People* v. *Hull*, 251 App. Div. 40; *People* v. *Price*, 262 N. Y. 410). He may desire to defend himself and here, too, the court has no right to appoint counsel (*People* v. *Price*, *supra*).

It may be urged that there is no showing in the record that this petitioner exercised such right. We concede that there is no *record* evidence of any such choice on his part. The facts, however, point quite clearly, nay conclusively,

to such choice by the petitioner. By the plea, even though such plea was attended by a severe sentence, the petitioner freed himself of the possibility of further indictment and punishment for other crimes. (This brief, page 24, *supra*). As the sentencing court pointed out, he was "the ring leader of the mob" and had admitted that he supplied the guns which he himself owned (R. 28). With such a record and taught by such experience, he undoubtedly made the choice for the reasons set forth by the county judge in these words:

> "When I took a plea of you to this one indictment unarmed—and that was the only thing the district attorney would consent to—in my judgment you got all the clemency that you deserve."

We close this phase of our discussion of the case by a quotation from the language of this court in *Betts* v. *Brady*, *supra*, which we submit to be a complete answer to the petitioner's contention:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel" (473).

II.

The fact of waiver affects the petitioner herein in still another aspect, this time going to the jurisdiction of this court. As we have pointed out, counsel who represented him on the day of sentence had the right to move to set

aside the plea of guilty (Code of Crim. Proc., Sec. 337), and from such denial of the motion could have appealed from the judgment of the court and on such appeal brought up the question of the impropriety of the denial of the motion. The appeal would have laid, as a matter of right, to the Appellate Division of the Supreme Court, and by proper leave to the Court of Appeals. Neither one of these courts would have rendered a decision "by the highest court of the state in which a decision could be had" (Sec. 237 of the Jud. Code, Tit. 28, Sec. 344 [b]). Instead, and as a matter of volition and choice the petitioner abandoned all right of appeal and chose, some fourteen years after the event, to initiate this proceeding in the nature of a motion *coram nobis*.[4]

Section 237 of the Judicial Code does not confer jurisdiction upon this court to review any cause wherein a final judgment or decree has been rendered in a particular proceeding *chosen by the litigant*, even though the court rendering it is in that instance the last court available. On the contrary, jurisdiction is conferred upon this court only after the litigant has been to the highest court in *any* proceeding which was open to him because of the nature of his grievance (*McKnight* v. *James, Warden*, 155 U. S. 685). It is interesting to note the parallel here with the *McKnight* case. There the petitioner, indicted for a crime, pleaded not guilty and was tried without having been as-

[4] The advantage to the petitioner in such a choice is so obvious as clearly to expose the reason motivating the choice. If he had proceeded to an appeal in 1931 and been successful, he would have been immediately subjected to a trial at which the people could have procured witnesses and successfully have established the fact of his guilt of Robbery in the First Degree. Delay has worked in his favor by almost geometric precision. Thus, witnesses who in 1931 could have been relied upon to establish the people's case cannot be produced in 1945 with the same facility, if they are at all in existence. In addition, there is the reason previously referred to, that the petitioner by his plea freed himself from further punishment by reason of other crimes committed by him.

signed counsel. After sentence, he sued out a writ of *habeas corpus* before a judge of the Ohio Circuit Court sitting in chambers, who dismissed the writ. This court held that the order of a judge sitting in chambers was not the order of a court. It further held that the petitioner might have applied to have the order of the judge in chambers made the order of the court itself. It was also held that if the order of the judge in chambers be the final order of the court itself, then it was reviewable by the Supreme Court of Ohio as that state's highest tribunal. This court summed up the matter in the following words:

> "In other words, the order cannot be the order of a judge to defeat the jurisdiction in error of the Supreme Court of Ohio, and at the same time an order of a court to confer jurisdiction upon this court to issue a writ of error. The argument in reality defeats itself. Its very strength is also its weakness. By proving that a writ of error will lie from this court, it also proves that a writ of error will lie from the Supreme Court of Ohio, and this fact of itself defeats the jurisdiction of this court."

We re-state the proposition thus: by an appeal from the judgment of conviction (including the ancillary question of the denial of the motion to set aside the plea of guilty) the petitioner could have presented the present question either to the Appellate Division of the Supreme Court or to that court and the Court of Appeals, and thus could have procured a determination by a court higher than the County Court of Kings County. In that event (and if a federal question actually existed) this court would then have had jurisdiction by virtue of section 237 of the Judicial Code. Petitioner's failure to avail himself of the right of appeal and his choice of a different method of procedure cannot confer a jurisdiction upon this court not otherwise existing.

The instant case, therefore, comes expressly within the opinion of Mr. Justice Frankfurter in *Whitman* v. *Wilson* (318 U. S. 688), in which he wrote as follows:

> "Since the argument in this case, the New York Court of Appeals formally dismissed petitioner's appeal to that court from the order of the Appellate Division denying him habeas corpus, on the ground that 'the case is one where appellant is not entitled to a writ of habeas corpus under Section 1231 of the Civil Practice Act'. But inasmuch as the constitutional questions which appellant asked the court to review are substantial, to use the language of Chief Judge Lehman, he could, under New York practice, have gone to the Court of Appeals as of right if habeas corpus were the proper remedy. The merits of petitioner's constitutional claim have therefore never been passed on—by, because never presented in an appropriate proceeding to, the highest available New York court. Consequently, it cannot be entertained here. *Since petitioner has misconceived the mode by which his constitutional claim may properly be brought before the New York courts, this petition should be dismissed.*" (Italics ours.)

Petitioner seeks to avoid the effect of his own voluntary choice of proceeding by citing the cases of *Betts* v. *Brady*, *supra*; *Jamison* v. *Texas* (318 U. S. 413); *Lavgent* v. *Texas* (318 U. S. 118), and *Tenner* v. *Dullea* (314 U. S. 694). All of these cases are distinguishable. We do not understand the reference to *Tenner* v. *Dullea*, *supra*, inasmuch as the petition for the writ of certiorari was there denied by this court "in the exercise of our discretion for the reason that petitioner has not presented his application for habeas corpus to the highest court of the state", with the right reserved to the petitioner so to do, and in the event of a denial by that court to renew in this court an application for a writ of certiorari. The *Lavgent* and

Jamison cases, *supra*, are distinguishable by reason of the facts passed upon in *Jamison* v. *Texas* by this court. In the opinion the following is found:

> "By our order of December 21, 1942, 63 S. Ct. 325, 87 L. Ed. —, we requested counsel to discuss whether this judgment could be fully reviewed on this record by a higher state court by habeas corpus or other proceeding. *Under the statutes of Texas, no appeal lies from the judgment of the County Court imposing a fine of this amount.* * * * Since there is by Texas law or practice, no method which has been called to our attention for reviewing the conviction of the appellant on the record made in the County Court, we are of the opinion the appeal is properly here under section 237a of the Judicial Code." (Italics ours.)

Of *Betts* v. *Brady*, *supra*, it may be said, on the question of jurisdiction, that this court there found the order dismissing the writ of *habeas corpus* to be "final in the sense that an order of a Maryland judge in a *habeas corpus* case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances claimed in statutes which are here inapplicable". Moreover, this court also said:

> "Although the judgment is final in the sense that it is not subject to review by any other court of the state, we may, in our discretion, refuse the writ when there is a higher court of the state to which another petition for the relief sought could be addressed. * * *" (Citing *Tegner* v. *Bullen*, *supra*.)

Furthermore, Betts had no counsel at any stage of the proceedings and cannot be held to have waived the right to appeal from the judgment of conviction. Here, the exactly opposite situation of the petitioner strongly raises, again, the factor of waiver.

It may be urged that failure to take an appeal from the judgment of conviction upon which we rely in part as proof of the waiver by the petitioner, is not in law such a waiver. It is true that in the case of *Williams* v. *Kaiser*, *supra*, this court said:

> "Missouri, however, does contend that the denial of counsel could have been challenged by petitioner by an appeal, that no appeal was taken, and that no extraordinary circumstances are shown which excuse that failure. Heretofore we have not considered a failure to appeal an adequate defense to habeas corpus in this type of case. *Smith* v. *O'Grady*, *supra*. Under these circumstances the failure to appeal only emphasizes the need of counsel. If an appeal were made such a requirement, the denial of counsel would in and of itself defeat the very right which the Constitution sought to protect."

In the *Williams* case, however, the fact was conclusively established that the defendant was at no time represented by an attorney, qualified by knowledge of the law to advise the defendant of the right to an appeal. This essential fact distinguishes the instant case from the *Williams* case and renders its language inapplicable, here, to defeat the proof of deliberate waiver.

In Conclusion.

We respectfully submit:

1. That no federal question is raised by any contention made by the petitioner in the case presented to this court.

2. The case presented by the petitioner is not one concerning which this court has jurisdiction under section 237 of the Judicial Code, tit. 28, sec. 344b, because of the

fact that no "final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * *."

III.

Therefore the order of the County Court of Kings County should be affirmed.

Respectfully submitted,

GEORGE J. BELDOCK,
District Attorney,
Kings County.

HENRY J. WALSH,
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Assistant District Attorneys,
Of Counsel.

Appendix.

Section 517, New York Code of Criminal Procedure.

"§ 517. *In what cases an appeal may be taken by defendant.*

An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death, the appeal must be taken direct to the court of appeals. * * *."

Section 520, New York Code of Criminal Procedure.

"§ 520. *Appeal, a matter of right; one appeal; how taken.*

All appeals, provided for by this chapter may be taken as a matter of right. Every person convicted in a criminal

action or proceeding shall have the right to have such judgment of conviction or order reviewed on appeal by an appellate tribunal as herein provided, but there shall be only one such appeal and the decision of the appellate court shall be final, and no appeal shall lie from that court to any other court except as hereinafter provided:

1. In the City of New York such appeals shall be taken as follows: * * * from a conviction by the court of general sessions of the County of New York or by a county court within said city * * * except where the penalty is death, to the Appellate Division of the Supreme Court * * *.

2. * * *

3. Where an appeal has been taken and has been decided by any of the appellate tribunals referred to, a further right of appeal to the court of appeals shall lie as hereinafter prescribed, but not otherwise. If a judge of the court of appeals or a justice of the Appellate Division of the Supreme Court * * * certifies that a question of law is involved which ought to be reviewed by the court of appeals, then a further appeal on such question of law may be taken to the court of appeals.

4. * * * *."

Section 337, New York Code of Criminal Procedure.

"§ 337. *Plea may be withdrawn, by permission of the court.*

The court may in its discretion, at any time before judgment upon a plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted."

CONSTITUTION OF THE UNITED STATES.

Sixth Amendment.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defense.

Fourteenth Amendment (in part).

"*Section 1.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

NEW YORK STATE CONSTITUTION.

Article One:

"Section 6. No person shall be held to answer for a capital or otherwise infamous crime, * * * unless on indictment of a grand jury; and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and to be confronted with the witnesses against him * * * "

New York Code of Criminal Procedure.

"§ 188. *Magistrate to inform defendant of the charge and his right to counsel.*

When the defendant is brought before a Magistrate upon arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had."

"§ 308. *Defendant appearing for arraignment without counsel to be informed of his right to counsel.*

If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel. * * * *."

New Jersey State Constitution.

Article I, Section 8. *Criminal prosecutions; rights of accused.*

In all criminal prosecutions the accused shall have the right to a speedy, and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel in his defense."

SUPREME COURT OF THE UNITED STATES.

No. 152.—October Term, 1945.

Frank Canizio, Petitioner, *vs.* The People of the State of New York.	On Writ of Certiorari to the County Court of Kings County, State of New York.

[February 4, 1946.]

Mr. Justice Black delivered the opinion of the Court.

On June 1, 1931 in the County Court of Kings County, New York, the petitioner pleaded guilty to the crime of robbery in the first degree. On June 19, 1931 that court sentenced him to serve a term of from 15 to 30 years in State prison. After the petitioner had served almost 14 years of this sentence he instituted this proceeding by a motion, coram nobis, in the King's County Court, praying that the June 19, 1931 sentence be vacated and set aside. His motion, verified by oath, alleged that at the time of his arraignment, guilty plea, and sentence, petitioner was 19 years old and unfamiliar with legal proceedings; that he was not represented by counsel; and that the court neither asked him whether he desired counsel to be assigned, nor advised him of his right to counsel. Petitioner's motion charged that the acceptance of his guilty plea and the sentencing under these circumstances violated Article 1, Section 6 of the New York State Constitution and Section 308 of the New York Code of Criminal Procedure, and deprived him of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

The District Attorney filed an affidavit opposing the motion. This affidavit, based on information obtained from Court records, admitted that these failed to show that petitioner had been represented by counsel when he was arraigned and when he pleaded guilty on June 1, 1931. To overcome this apparent defect of the record the affidavit urged the presumption of regularity of judicial proceedings to support the conclusion, in the absence of a clear showing to the contrary, that the judge must have performed his duty under New York's laws to advise petitioner of

his right to counsel. The District Attorney contended that petitioner's motion though verified was not sufficient to overcome this presumption, especially since petitioner's conviction occurred 14 years ago. Moreover, the affidavit denied that petitioner was not represented by counsel at the time of sentencing, and alleged that on June 17, 1931, two days before the sentence was imposed, there was filed a notice of appearance of counsel on behalf of the petitioner. Thus, according to the affidavit petitioner was represented by counsel from June 17th to June 19th, 1931. Petitioner filed no denial to this affidavit.

The Court denied petitioner's motion on the basis of the aforementioned papers including the record of the original proceeding, and without permitting petitioner to introduce any evidence. Under New York practice petitioner's motion was the proper procedure to raise the Federal question. *Lyons* v. *Goldstein*, 290 N. Y. 19. Since the Court's denial of the motion cannot be appealed to any higher New York Court, *People* v. *Gersewitz*, 294 N. Y. 163, we have jurisdiction to consider the case. *Betts* v. *Brady*, 316 U. S. 455, 461. We granted certiorari because the case presents an important question involving the right to counsel under the Constitution of the United States.

Before we consider this question we shall assume that petitioner was without counsel when arraigned and when he pleaded guilty and that although he was unfamiliar with his legal rights the court failed to inform him of his right to counsel. Consequently, had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced, his charges would have been such as to have required the Court to hold a hearing on his motion. *Rice* v. *Olson*, 324 U. S. 786. But, the District Attorney's affidavit and the record and stenographic transcripts of the original proceedings in which petitioner was sentenced show that petitioner was actively represented by counsel in long hearings during the day of sentence. In our opinion, these new facts, undenied, so far refuted petitioner's entire Constitutional claim as to justify the court's holding that a hearing on petitioner's motion was unnecessary.

These papers before the trial court showed that petitioner along with two others were originally charged under three counts. Petitioner pleaded guilty on one charge on condition that he would not

be prosecuted on the other two. Thereafter, as we have indicated, an attorney appeared on his behalf in an effort to secure a low sentence. The attorney could have moved to withdraw the plea of guilty and the County Court of Kings County would have had the power to set aside the plea and let the petitioner stand trial. New York Code of Criminal Procedure, § 337; *People* v. *Gowasky*, 244 N. Y. 451. Petitioner's counsel probably thought it undesirable to do so, because this move might have jeopardized his chances for securing a low sentence. The plea was to robbery in the first degree, unarmed. The record clearly shows that petitioner was heavily armed. Had he been convicted of first degree robbery while armed he would in all likelihood have gotten a higher sentence. Cf. *People ex rel. Oberst* v. *Murphy*, 256 App. Div. 58; *People ex rel. Pilo* v. *Martin*, 262 App. Div. 1056. At any rate, whatever the reason petitioner's counsel did not move to withdraw the guilty plea.[1] All of this demonstrated to the satisfaction of the court below that even though petitioner may not have had counsel at the beginning, he had counsel in ample time to take advantage of every defense which would have been available to him originally. We think the record shows that petitioner actually had the benefit of counsel. When that counsel took over petitioner's defense he could have raised the question of a defect in the earlier part of

[1] The assumption cannot be made that had petitioner's counsel done so it would not have been granted. If the motion had in fact been denied, petitioner's counsel could have appealed and thus have brought up the denial of the motion. Code of Crim. Proc. Sec. 517; People v. Joyce, 41 Hun. 641. If the case had then eventually reached us our previous decisions would have compelled us to hold the denial of the motion improper. See e. g. Rice v. Olson, *supra*. But the question is not before us in this proceeding.

It is suggested that the New York case of People v. Steinmetz, 240 N. Y. 411, which allows a withdrawn guilty plea under some circumstances to be admitted at trial as evidence in the nature of a confession, might have compelled counsel to refrain from making a motion to withdraw the plea because in view of the *Steinmetz* rule little would thereby be accomplished in a practical way. In the *Steinmetz* case defendant had been represented by counsel at the time of the guilty plea. The opinion, read as a whole, seems to indicate that a guilty plea would be inadmissible as evidence at a trial, where it was later withdrawn because defendant, ignorant of his right to counsel, had at the time of pleading guilty not been informed of his right. We have held that in a federal court a withdrawn guilty plea is not admissible in evidence. Kercheval v. United States, 274 U. S. 220, 223, 225. See also People v. Ariano, 264 App. Div. 426. If a guilty plea without counsel should be held admissible in New York, the proper case in which to raise the issue of the propriety of its admission is on appeal to this Court on conviction after trial. Otherwise, if such an admission is proper at all it would also be proper if a trial is had after we reversed this case. Consequently nothing would be gained by a reversal on that ground.

the proceedings.[2] Failing to do so when the statute afforded him the opportunity, we cannot say that the court denied petitioner the right to have a trial with the benefit of counsel.

Petitioner's motion was, therefore, properly denied.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice MURPHY, dissenting.

The complete travesty of justice revealed by the record in this case forces me to dissent.

The constitutional right to assistance of counsel is a very necessary and practical one. The ordinary person accused of crime has little if any knowledge of law or experience in its application. He is ill-prepared to combat the arsenal of statutes, decisions, rules of procedure, technicalities of pleading and other legal weapons at the ready disposal of the prosecutor. Without counsel many of his elementary procedural and substantive rights may be lost irretrievably in the intricate legal maze of a criminal proceeding. Especially is this true of the ignorant, the indigent, the illiterate and the immature defendant. *Powell* v. *Alabama*, 287 U. S. 45, 69; *Williams* v. *Kaiser*, 323 U. S. 471, 474-476. Courts must therefore be unyielding in their insistence that this basic canon of justice, this right to counsel, be respected at all times.

Today, however, a serious qualification is added to this constitutional right to which I am unable to assent. Petitioner and two others were indicted on May 25, 1931, for three offenses: (1) robbery in the first degree; (2) grand larceny in the second degree; and (3) assault in the second degree. They were arraigned on the same day and pleaded not guilty. Petitioner at this time was but 19 years old, indigent, poorly educated, orphaned and ignorant of his right to counsel. The court did not inform him of his right to counsel at this time and it does not appear that he competently and intelligently waived his constitutional right. Several days later, on June 1, petitioner again appeared without counsel and without being informed of his right in that respect. This time he withdrew his plea of not guilty and entered a plea of guilty to the crime of first degree robbery. The prosecutor agreed to withdraw the other charges. On June 17,

a notice of appearance of counsel on behalf of petitioner was filed. And on June 19, in the presence of this counsel, petitioner was sentenced to serve from 15 to 30 years in prison. On the basis of these facts, the Court now holds that petitioner was adequately represented by counsel. The error manifest in the denial of the right of counsel during the arraignment and the plea of guilty is held cured by the mere presence of counsel on the day of the imposition of the sentence.

It is said that, at least under New York practice, the attorney on the day of the sentencing could have moved to withdraw petitioner's plea of guilty; the judge would then have had power to set aside the plea and let the petitioner stand trial. On the assumption that the judge would have granted such a motion had it been made, the argument is advanced that petitioner had counsel in ample time to take advantage of every defense originally available. Thus the conclusion is reached that this denial of the right to counsel prior to the imposition of sentence is in compliance with the Constitution.

In my opinion, however, the right to counsel means nothing unless it means the right to counsel at each and every step in a criminal proceeding. The failure at any particular point to have representation or to be aware of one's right to counsel may have an indelible and imponderable effect upon the entire proceeding, an effect which may not be erasable on the day of imposing the sentence. As was said in *Glasser* v. *United States*, 315 U. S. 60, 76, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." So here we cannot assume or determine that the denial of counsel at the time of the arraignment and plea was harmless. Nor can we say with certainty that the presence of counsel at the final stage of the proceeding was sufficient to counteract the prejudice inherent in the prior denial of counsel. Unless all the effects of such a constitutional infirmity are completely and unquestionably eliminated, a conviction cannot stand. An elimination of that nature ordinarily, and particularly in this case, means a new proceeding in which the right to counsel is fully protected at all times.

It is further significant that the failure of the trial court to inform the petitioner of his right to counsel was in violation not

only of the due process clause of the Fourteenth Amendment but also of Article 1, Section 6, of the New York Constitution and of Sections 8, 188, 308 and 309 of the New York Code of Criminal Procedure. The arraignment and the plea of guilty were thereby vitiated, from which it follows that the conviction was inconsistent with due process of law. See *Johnson* v. *Zerbst*, 304 U. S. 458, 468; *Waley* v. *Johnston*, 316 U. S. 101, 104.

The lack of due process in the conviction was unaffected by the possibility that the counsel which petitioner eventually obtained might have successfully moved to vacate the void plea of guilty. Constitutional rights as well as due process requirements rest upon something more substantial than what might have been but was not done. The inescapable facts confronting us are that petitioner was denied the right to counsel and that the court's judgment was based upon an illegal arraignment and plea. Counsel's negligence in failing to move to set aside that plea should not blind us to those facts, nor can it invest the proceeding with the due process which it otherwise lacked.

Moreover, even had petitioner's counsel been successful in making such a motion, the effect of the illegal plea might not have been dissipated. Under New York law, a plea of guilty which is withdrawn may subsequently be admitted in evidence at the trial. *People* v. *Steinmetz*, 240 N. Y. 411, 148 N. E. 597. And even though such a practice might be of doubtful constitutionality under these circumstances, the possibility of its occurrence may have effectively and understandably deterred counsel from seeking to set aside the plea and subjecting petitioner to the risk of a greater sentence.

The denial of the petitioner's constitutional rights was a serious matter. Unaided by counsel, he was faced with charges of three crimes. Each of these crimes involved different degrees. Petitioner was not competent to decide whether he was properly charged with the correct degree of each crime. Nor was he competent to determine whether to plead guilty to any or all of the offenses. Those were complex legal problems as to which petitioner deserved legal aid. Yet that necessary aid was denied him. Nothing happened on the day of sentencing, moreover, to negative that fact. To sustain his conviction therefore fails to give petitioner the high degree of protection which his constitutional right to counsel deserves.

Mr. Justice RUTLEDGE, dissenting.

I agree with my brother MURPHY that the judgment should be reversed and join substantially in his opinion.

My conclusion rests squarely upon the fact, as I understand the record and the law of New York, that under that law a withdrawn plea of guilty is admissible in evidence against the accused at his later trial. *People* v. *Stratimacs*, 240 N. Y. 411. I have heretofore expressed my reasons for thinking that such a procedure involves a species of self-incrimination. *Wood* v. *United States*, 128 F. 2d 265. That question however has not been determined here, although it has been held on nonconstitutional grounds that in a federal court a withdrawn plea of guilty is not admissible. *Kercheval* v. *United States*, 274 U. S. 220. Nor has this Court decided whether such a procedure followed in a state court would be in violation of any constitutional provision.

In the setting of the facts in this case the significance of the New York rule is that the rule itself made it impossible for the full effects of petitioner's invalid plea of guilty to be wiped out even through a successful motion for withdrawal had one been made by petitioner's attorney after his appearance in the cause following the plea and shortly before sentence.

It is not at all certain that the motion would have been successful. Had it been made and granted, petitioner by the state's law would have been confronted with the necessity of overcoming by proof the incriminating effect of his prior plea. His burden of defense thus increased not only would have been greater than if the invalid plea had not been made. It would have gone far to destroy the presumption of innocence to which he was entitled until otherwise and lawfully proved guilty. Finally, his lawyer presumably would have been cognizant of these facts. Imagination need not be stretched to believe that even the most competent attorney, confronted with such a situation, might have chosen to advise against moving to withdraw the plea rather than undertaking the heavy burden of meeting it by proof at the trial.

In my opinion the damage done by the original invalid plea was not removed by the attorney's eleventh-hour entry nor could it have been at that time, fully and effectively, in view of the existing state of the law and the facts. Accordingly, I think there was no effective waiver through the late entrance of counsel and his hampered advice, which as I understand is the only basis for the Court's decision. There was no choice but Hobson's.